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88-683

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CARLTON JAMES LEWIS, *Petitioner,*

v.

SHAWN KATHLEEN LEWIS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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October 21, 1988

QUESTIONS PRESENTED

1. Whether the Michigan Court of Appeals erred in holding that, under *Roe v. Wade* and its progeny, a state court may not enjoin an abortion where the woman's physician has determined that the abortion is not medically necessary for her well-being and where competing interests have been asserted?

2. Whether *Roe v. Wade* should be reconsidered, because this Court is in a better position to consider the abortion dilemma today than in 1973, and because the balancing of competing interests required herein is more properly and effectively performed by the legislatures of the states?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Carlton James Lewis, father of Unborn Child Lewis, the respondent Shawn Kathleen Lewis, mother of Unborn Child Lewis, and Gene Myers, guardian ad litem for Unborn Child Lewis. Gene Myers has already filed with this Court a Petition for a Writ of Certiorari to the Michigan Court of Appeals in the present case, docket number 88-555.

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PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

Petitioner Carlton James Lewis, father of Unborn Child Lewis, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Michigan Court of Appeals, entered in *Lewis v. Lewis and Myers* on September 15, 1988.

OPINIONS BELOW

The Order of the Michigan Supreme Court (not reported), refusing to review the opinion of the Michigan Court of Appeals, is reprinted in the appendix hereto, p. 1a, *infra*.

The Order of the Michigan Court of Appeals (not reported) is reprinted in the appendix hereto, p. 3a, *infra*.

The Stipulated Findings of Fact and Conclusions of Law of the Genessee County Circuit Court is reprinted in the appendix hereto, p. 7a, *infra*.

JURISDICTION

The Jurisdiction of this Court to review the judgment of the Michigan Court of Appeals is invoked under 28 U.S.C. § 1257(3) based on the assertion by the respondent of rights under the Constitution of the United States.

The petitioner Carlton James Lewis, father of Unborn Child Lewis, obtained a preliminary injunction in the Genesee County [Mich.] Circuit Court, on September 6, 1988, barring his wife from obtaining an abortion. Appendix at 7a. He argued in the trial court that *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), did not preclude a court from considering the rights and interests of both a mother and a father in determining whether she should be enjoined from obtaining an abortion. The respondent argued that *Roe* gave her an absolute right to abortion and that *Danforth* forbade the court from considering the rights and interests of her husband and enjoining her abortion.

On the respondent's appeal, the Michigan Court of Appeals, on September 15, 1988, ordered the preliminary injunction dissolved, holding that, under *Roe* and *Danforth*, the act of the trial court in enjoining the abortion was unconstitutional. Appendix at 3a. On the petitioner's appeal, the Michigan Supreme Court, on September 22, 1988, declined to accept the case for review. Appendix at 1a. No rehearing was sought.

Thus, there is a decision from the highest court of the state of Michigan. Moreover, despite the fact that the injunction was styled a preliminary one, the order of the Michigan Court of Appeals dissolving the preliminary injunction makes the matter final for purposes of appeal. There can be no further hearings. As the precedents now stand, there cannot even be further cases on this issue, at least in Michigan.[1]

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[1] Likewise, the assertion of paternal interests in the abortion context may no longer be asserted in Indiana, due to a contrary precedent, now before this Court on a Petition for a Writ of Certiorari to the Indiana Supreme Court, styled *Conn v. Conn*, docket number 88-347.

While no official notice has been given, the Father believes that the Mother has already aborted their unborn child. However, this case is within the exception to the mootness doctrine for matters "capable of repetition, yet evading review," as that doctrine is employed in abortion cases. *Cf. Roe*, 410 U.S. at 125; *Doe v. Bolton*, 410 U.S. 179, 187 (1973). In the 1988 case of *Honig v. Doe*, 108 S.Ct. 592 (1988), Justice Scalia, in a concurring opinion joined by Justice O'Connor, observed that the requirement that the matter be capable of repetition between the same parties is relaxed in cases involving election and abortion. *Id.* at 610. In abortion jurisprudence, it is sufficient if the matter is capable of recurring between the complaining party and the public at large. *Id.* at 610-11.

This Court, in *Honig*, declared that it "ha[d] jurisdiction if there is a reasonable likelihood that respondents will again suffer the deprivation" complained of in the case. *Id.* at 601. In the present case, as in *Honig*, "such a possibility does in fact exist and . . . the case therefore remains justiciable." *Id.*

In *Honig*, this Court found that, although a young man with a disability had dropped out of school, as long as "he remain[ed] a resident of California" there was a "reasonable likelihood" he might return and again be deprived of the sort of educational care required by law. *Id.* In the present case, as long as the Father remains a resident of Michigan, both he and fathers in the general public will continue to be deprived, by the erroneous decision of the state appellate court, from asserting paternal rights and interests against abortions for which there is no fundamental right. These fathers will continue to be subject to the abortion on demand of their unborn children, even in cases where the only medical judgment is that the abortion is unnecessary for the well-being of the mother. There is a reasonable likelihood that, as a young man of proven fecundity, he will again become a father. As such, given the high annual rate of abortions, he may well face again this precise situation. Thus, this matter is reasonably likely to recur between the Father and the state. Moreover, it is certain that other fathers will likewise be deprived of the right to assert

their rights and interests by the action of the Michigan courts in this matter. The annual rate of a million and a half abortions per year, a substantial number of which occur in Michigan, guarantees recurrence.

As to the second part of the test — "yet evading review" — if "[p]regnancy provides a classic justification for a conclusion of nonmootness," *Roe*, 410 U.S. at 125, because of its "266-day human gestation period," *id.*, then abortion, usually performed in the early weeks of pregnancy, does so even more. "If that termination makes a case moot, pregnancy [and abortion] litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid." *Id.*

Finally, every effort was made to bring this case before this Court on the merits before it became subject to mootness challenges.[2] These efforts, including an application for a stay pending certiorari review and a motion for expedited consideration, which were filed and considered while the injunction, extended by the Michigan Supreme Court, was yet in effect, proved unsuccessful. As the precedents now stand, there can be no controversies more live than this one in which to consider the issues herein. Otherwise, "appellate review would be effectively denied," a result sought to be avoided in *Roe*. *Id.*

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[2] As in *Honig*, both the petitioner and the respondent believe that this case is yet justiciable. *Honig*, 108 S.Ct. at 601 n. 5. In her opposition to this Court's grant of a stay pending expedited consideration of this case, the Mother argued:

> In any event, Carlton is clearly wrong in contending, in support of finality, that if Shawn had an abortion the case would be moot. At this Court has held, pregnancy is a 'classic' example of an issue that is 'capable of repetition yet evading review' and thus an exception to the normal rules of mootness.

Response to Petitioner's Application for a "Stay" Pending Petition for Certiorari to the Michigan Supreme Court at 3 n. 2 (citations omitted).

CONSTITUTIONAL PROVISION INVOLVED

> All persons born or naturalized in the United States . . . are citizens of the United States . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

On January 20, 1988, the respondent (hereinafter the Mother) filed for divorce from the petitioner (hereinafter the Father). During a period of reconciliation, from late May to mid-July, 1988, the parties engaged in multiple acts of coitus without contraception, although they had employed contraception at previous times. Defendant's Response to Plaintiff's Brief in Support of Motion to Dissolve Ex-parte Preliminary Injunction at vi. Around August 8, 1988, the Mother informed the Father that she was seven or eight weeks pregnant and intended to have an abortion. She does not dispute that he is the father.

On August 9, 1988, on the Father's motion, the Genessee County Circuit Court issued a Temporary Restraining Order, ex parte, prohibiting the abortion. Around August 17, counsel for the Mother appeared and urged that this abortion was necessary for the health of the Mother. The trial court declared it would dissolve the injunction on August 19, 1988, if this assertion could be documented. On August 19, the Mother's counsel admitted to the trial court that the woman's personal physician had, in fact, indicated that there were no health reasons for the abortion. Appendix at 8a, 20a. The trial court offered the Mother's counsel a hearing on whether the injunction ought to be dissolved, but the Mother's counsel agreed that a hearing on September 6, 1988, "would be in plenty of time in terms of her client's physical condition to have a decision of the

Court on the issue of dissolving the injunction." Appendix at 8a.

On September 6, 1988, the Circuit Court conducted a hearing and found that the abortion sought was not medically necessary for the well-being of the Mother. *Id.* Based upon a written statement, entered into evidence, from the Mother's attending physician, the court found that the abortion decision "was specifically a social decision as opposed to a medical decision to terminate the pregnancy." Appendix at 20a. *Cf.* Statement of J. Stoker, O.D., at 20a.

On September 6, 1988, the Circuit Court issued a preliminary injunction prohibiting the Mother from having an abortion and certified the Order as a "Final Order For Purposes of Appeal There Being No Just Cause For Delay."[3] The Court also appointed attorney Gene Myers as Guardian Ad Litem for the Unborn Child during the pendency of this matter.

On September 15, 1988, the Michigan Court of Appeals ordered the the trial court's injunction dissolved, but issued a stay of its order pending appeal to the Michigan Supreme Court.

On September 15, 1988, the Michigan Supreme Court granted appellants' motion for immediate consideration of their application for leave to appeal and ordered any further briefing to be submitted by 5:00 p.m. on September 20, 1988.

On September 22, 1988, the Michigan Supreme Court refused to review the Court of Appeals decision but extended the stay of the appellate court's order until Monday, September 26, 1988 at 5:00 p.m.

On Friday, September 23, 1988, an application for a stay pending certiorari review and a motion for expedited appeal

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[3] The circuit court distinguished *Roe* from the present case on factors not argued herein. Rather, the Father defends the trial court's decision on the basis of the finding of no medical necessity for the abortion, as required by *Roe v. Wade*.

were submitted to Justice Scalia, circuit justice for the sixth circuit, and were by him referred to the whole Court on Monday, September 26, 1988. The application and motion were denied that day.

The federal constitutional issues, under the Fourteenth Amendment, have been raised in this case from its inception. Before the trial court, the Mother asserted her constitutional right to an abortion, as noted *supra*. The scope of the abortion privacy right was likewise raised to the Michigan Court of Appeals. In his brief to that court, the Father argued that *Roe* did not give a woman an "absolute right to an abortion," thereby rejecting the abortion on demand sought by the Mother herein. Brief of Appeal for Defendant-Appellee at 7. The Mother argued to the court of appeals that the refusal of the trial court to dissolve its injunction "totally contradicts the U.S. Supreme Court's explicit rulings in *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*." Plaintiff's Brief in Support of Application for Appeal and for Immediate Consideration at 6. All parties, the Father, the Mother, and the Guardian Ad Litem have continued to raise the issue of the scope of *Roe* and its progeny throughout the proceedings, including earlier applications to this Court.

REASONS FOR GRANTING THE WRIT

This Petition should be granted because the Michigan Court of Appeals erred grievously in ordering the injunction prohibiting the abortion herein dissolved, based on its incorrect interpretation of *Roe v. Wade* and its progeny. By its error, the court of appeals unconstitutionally deprived the Father of his unborn child by sanctioning abortion on demand, which has been rejected by this Court. The only evidence adduced in this case is that the woman's attending physician made a medical judgment that the abortion sought in this case was not medically necessary for her well-being. The decision of the appellate court violates the clear holding of *Roe* that abortion is primarily a medical decision and that there must be a medical judgment that the abortion is medically necessary for the well-being of the Mother. The argument herein may be briefly summarized.

First, *Roe* held that an abortion decision is "inherently, and primarily, a medical decision, and basic responsibility for it must rest with the [woman's] physician." *Roe*, 410 U.S. at 166. *Roe* also declared that the right to abortion is not "absolute," *id.* at 154, but that it "must be considered against important state interests in regulation." *Id.* *Roe* did not recognize a fundamental right to abortion in situations where there was mere demand or where the woman's physician has determined that the abortion is not medically necessary for her well-being, as in the case at bar. Therefore, the Mother's interest in an abortion is not a fundamental right. The state's action in enjoining her abortion need only be rationally related to a permissible state purpose.

Second, the state has a constitutionally permissible purpose in protecting legitimate interests of the Father, the state, and the unborn child. The Father has interests in his children, recognized as rising to the level of constitutional rights, which include the care, custody, control, and companionship of his child, which interests logically extend to unborn children. *See, e.g.*, *Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972). The state has an interest in preferring childbirth over abortion. *Harris v. McRae*, 448 U.S. 297, 314 (1980); *Maher v. Roe*, 432 U.S. 464, 474 (1977). The state also has an interest in protecting unborn human life which was recognized in *Roe* itself. *Roe*, 410 U.S. at 159, 163. Neither *Roe* nor *Danforth* precluded the consideration of paternal rights and interests. This, of course, is particularly true where the right of the mother is not fundamental by reason of a lack of medical necessity. In *Roe*, consideration of a father's rights was expressly postponed, because such rights were not raised. *Roe*, 410 at 165 n.67. *Danforth* dealt with a statute requiring spousal consent, whether or not the spouse was the father, which could be withheld for any or no reason, or by mere inability to be found, and rejected a unilateral approach to the abortion decision. *Danforth*, 428 U.S. at 69, 71. By contrast, the Father herein seeks a judicial consideration of competing rights and interests, based on the facts of each case. Such

consideration is rationally related to a permissible state purpose and, therefore, the action of the trial court in enjoining this abortion was not constitutionally infirm. It would also be constitutionally sound if done to protect the other two interests asserted.

Third, if, however, the decisions of this Court have reached the point where abortion on demand, even where the medical evidence indicates no medical reason for the abortion, is now considered constitutionally protected, and no competing interests may be weighed (such as those asserted on behalf of the Father, the state, and the unborn child), then *Roe* should be reconsidered for its pernicious effects. Moreover, as it is clear that the balancing of interests required in a case such as this is historically and practically more properly and effectively done by the legislature, *Roe* should also be reconsidered for this reason.

I. THE MICHIGAN COURT OF APPEALS ERRED IN ITS ANALYSIS OF *ROE v. WADE* AND *PLANNED PARENTHOOD OF CENTRAL MISSOURI v. DANFORTH*.

A. ROE DID NOT RECOGNIZE THE CONSTITUTIONAL PROTECTION AFFORDED FUNDAMENTAL RIGHTS FOR ABORTIONS NOT MEDICALLY NECESSARY FOR THE WELL-BEING OF THE MOTHER.

The Michigan Court of Appeals declared the injunction, barring the abortion herein, an interference with plaintiffs constitutional rights, as set forth in *Roe* and *Danforth*.[4] Appendix at 3a. In *Roe*, *Doe v. Bolton*, 410 U.S. 179 (1973), and other cases, this Court held that the abortion right is not absolute, that it is not equivalent to abortion on demand, that it "must be considered against important state interests," and that it must

[4] Although the appellate court relied on *Danforth* as well as *Roe*, *Danforth* did not address the point of medical necessity. As seen *infra*, *Danforth* did not preclude judicial consideration of the rights and interests of both the mother and the father in the abortion context.

be properly the subject of a medical decision determining it to be necessary for the well-being of the mother. *Roe*, 410 U.S. at 154, 166. The analysis in the Petition for a Writ of Certiorari filed in this case by the Guardian Ad Litem herein is adequate on this point. *See* Petition of Guardian Ad Litem at 8-13. That exposition need not be repeated.

In sum, *Roe* and its progeny only recognized a fundamental right to an abortion where the abortion was medically necessary for the well-being of the mother. This resulted from the Court's consideration of the balance of rights between a maternal abortion interest and the competing interests of the state and the unborn child. Any interest asserted by the Mother herein in having an abortion not conforming to this paradigm must be considered a nonfundamental interest, lowering the level of scrutiny on judicial review. As the abortion sought herein is not medically indicated, the analysis must be that applying to nonfundamental rights.

Although *Danforth* was relied upon by the appellate court, it did not address this issue, as it was not before it. Thus, any perceived restriction of *Danforth* on the assertion of spousal or paternal interests in the abortion context is wholly inapplicable, because any such restriction would apply only where the woman has a fundamental right to her abortion. Here, the Mother has no fundamental right to abortion, for she has failed to adduce evidence showing her case to be within the protection of *Roe*, i.e., there are no medical indications for her abortion. Thus, this case is of a different nature than that of *Conn v. Conn*, now before this Court on a Petition for a Writ of Certiorari, docket number 88-347, in which it is argued that, despite the woman's fundamental right to abortion, competing interests of her husband, the father of her child, must be considered. In *Conn*, a compelling interest needs to be shown, due to the presence of a fundamental right.[5] In the present

[5] This is true only of the substantive due process analysis. The petitioner in *Conn* also argues an alternative, independent theory based on the balancing of competing rights. *See Conn v. Conn*, docket number 88-347, Petition for a Writ of Certiorari at 27-28.

case, the action of the state need only be rationally related to a constitutionally permissible purpose, because the abortion sought is not within the protection afforded fundamental rights.

B. ABSENT CONSTITUTIONAL PROHIBITION, AN ABORTION MAY BE PROSCRIBED BY A STATE COURT WHERE WEIGHTY, COMPETING INTERESTS ARE ASSERTED.

As the abortion "right" asserted by the Mother herein is necessarily a nonfundamental interest, the proper analysis asks whether the action of the state court in enjoining the abortion was rationally related to a legitimate state purpose. *Maher v. Roe*, 432 U.S. 464, 478 (1977). Further discussion of the appropriate test is set forth in the petition of the Guardian Ad Litem and need not be repeated here. *See* Petition of Guardian Ad Litem at 16-17. However, in the Guardian's petition, only the interests relating to the unborn child were discussed — the interests of the state in protecting unborn human life and in preferring childbirth over abortion. While judicial protection of either of these would adequately support the trial court's action, the Father herein sets forth his own interests in his unborn child as an independent basis for supporting the action of the trial court.

1. THE FATHER HAS PROFOUND FUNDAMENTAL RIGHTS AND INTERESTS IN HIS UNBORN CHILD.

Fathers have profound fundamental rights and interests in their children rooted in the biological relationship arising from their status as procreator of the child and, in this case, in their participation in the societally sanctioned institution of marriage. These rights have been recognized from antiquity. Logically, they extend to the unborn child as well as the born child, because the father has no less interest in the procreation of this particular child before birth than after it is born, he is no less a biological father before birth than after, and he is no less a

husband before birth than after. Analytically, there are three distinct interests.

First, the Father has a right and interest in procreation, which is especially significant where it has become particularized in this specific, Unborn Child. Procreation is "the entire process of bringing a new individual into the world." *Dorland's Illustrated Medical Dictionary* (24th ed. 1965). Procreation is not something that happens at the moment of birth. The interest in procreation was recognized as rising to the level of a fundamental constitutional right by this Court. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). While no man has a right to force a woman to procreate with him, where an unborn child has already been procreated by consensual sexual intercourse (in this case during repeated coitus without use of contraception), the father has a distinct constitutional interest in protecting the unborn child which he has procreated.

Second, the Father has a right and interest in his unborn child, which is a natural right inherent in his biological relationship to the child. The right of procreation does not, in and of itself, give a father the right to the custody of the child at birth, as was noted by the court in the recent case of *In re Baby M*, 537 A.2d 1227, 1253 (N.J. 1988). They are distinct rights. *Id.* The right of a natural father to the care, custody, control, and companionship of his children has been recognized in several cases of this Court. *See, e.g., Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972). This right includes within its scope the "loving protection" of the child. *Rivera v. Minnich*, 107 S.Ct. 3001, 3004 (1987). It is elementary that a "child" exists prenatally,[6] and that a father cannot enjoy the care, custody, control, and companionship of a dead, aborted child. This right is a "fundamental liberty interest," which may not be terminated absent clear and convincing evidence of parental unfitness. *Santosky v. Kramer*, 445 U.S.

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[6] *See, e.g., Black's Law Dictionary* (5th ed. 1979) ("Child . . . Unborn or recently born human being."); *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946).

745, 753 (1982). "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Id.* The action of the Michigan Court of Appeals in ordering dissolved the trial court's injunction deprived the Father herein of this right to his unborn child absent any showing of his unfitness.

Third, the Father has a fundamental right and interest inherent in his status as a husband in the family unit. Even before privacy rights were recognized as attaching to individuals, they were found to be inherent in the family and marital relationships. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943). The "sacred" marital right of privacy is "older than the Bill of Rights." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1964). It is "fundamental" because it is rooted in the "traditions and [collective] conscience of our people." *Id.* at 493 (Goldberg, J., concurring)(quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). As a woman's fundamental abortion privacy right arises from this same constitutional locus it cannot be considered superior to that of her husband built on the identical foundation. Moreover, in the present case, where the Mother's interest does not even rise to the level of a fundamental privacy right, for failure to conform to the *Roe* paradigm requiring medical necessity, the Father's rights and interests must be superior.[7]

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[7] Even where some medical indication for an abortion exists, under the broad definition of maternal health adopted in *Doe v. Bolton*, 410 U.S. 179 (1973), thus, making the woman's interest rise to the level of a fundamental right, abortion jurisprudence does not preclude the consideration of the father's rights and interests in his child with those of the mother in aborting the child. *Roe* specifically postponed consideration of paternal interests, as they had not been raised in that case. 410 U.S. 165, n. 67. *Danforth* found unconstitutional a state statute requiring the consent (which could be denied for any or no reason or be unavailable merely because the spouse could not be located) of the spouse (whether or not he was, in fact, the biological father). 428 U.S. at 69, 71. Faced with a statute which permanently and absolutely struck the balance of rights of parents in favor of the husband in every case, this Court found it unconstitutional. *Id.* at 69. This Court was careful in responding to the dissent of Justice White, *id.* at 93, to clarify that it was not considering the constitutionality of a more nuanced approach. *Id.* at 70-71 n. 11. Thus, *Danforth* does not proscribe the consideration of a father's rights and interest, along with those of the mother, on a case by case basis, even where the mother's right may be characterized as fundamental.

2. THE STATE COURT'S PROTECTION OF THE FATHER'S FUNDAMENTAL RIGHTS AND INTERESTS WAS RATIONALLY RELATED TO A CONSTITUTIONALLY PERMISSIBLE PURPOSE.

The father has clear and profound interests in his children, which have been recognized by this Court as sufficiently weighty to qualify as fundamental rights. State protection of the rights and interests of its citizens is a constitutionally permissible purpose, indeed it is the very reason why courts exist.

An injunction, based on an individualized, judicial consideration of competing rights and interests, is rationally related to the state's constitutionally permissible purpose. The injunction herein precisely effectuated the purpose which the state sought to pursue. Thus, it was rationally related to the constitutionally permissible purpose and was not unconstitutionally infirm.

II. RECONSIDERATION OF THIS COURT'S DECISION IN *ROE v. WADE* IS APPROPRIATE, BECAUSE THIS COURT IS IN A BETTER POSITION TO CONSIDER THE ABORTION DILEMMA TODAY THAN IN 1973, AND BECAUSE THE BALANCING OF COMPETING INTERESTS REQUIRED IN THE CONTEXT OF THIS CASE IS MORE PROPERLY AND EFFECTIVELY THE SUBJECT OF STATE LEGISLATIVE ACTION.

If, indeed, the cases of this Court recognize the principle of abortion on demand, as sought in this case by the Mother, even where a woman's physician has expressly determined that the abortion sought is not medically necessary for her well-being, then *Roe* and its progeny should be reconsidered.

Recognition of abortion on demand was not the intent of the *Roe* majority, declared Chief Justice Burger in his dissent to *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169, 2190 (1986). He maintained that

"every member of the *Roe* Court rejected the idea of abortion on demand." *Id.* Noting that *Thornburgh* "plainly undermine[d] that important principle," *id.* at 2190, he left the majority and voted with the dissent. He added:

> We have apparently already passed the point at which abortion is available merely on demand. If the statute [requiring informed consent procedures] at issue here is to be invalidated, the 'demand' will not even have to be the result of an informed choice.

Id. at 2191.

Chief Justice Burger concluded:

> The soundness of our holdings must be tested by the decisions that purport to follow them. If *Danforth* and today's holding really mean what they seem to say, I agree we should reexamine *Roe*.

Id. at 2192.

To hold for the Mother on the facts of this case would be to recognize constitutional protection for abortion on demand. It would be to go beyond the holding of *Roe* itself. If the recent cases of this Court require such sanctioning of abortion on demand, then *Roe* should be reconsidered as having led to pernicious results.

The reconsideration of *Roe* is appropriate for two additional reasons: (1) the Court today is in a better position to evaluate the abortion dilemma than it was in 1973, and (2) the balancing of competitive interests required in this case is more properly and effectively the subject of state legislative action.

A. THIS COURT IS BETTER ABLE TO EVALUATE THE ABORTION DILEMMA TODAY THAN IT WAS IN 1973.

This Court is in a better position today than it was in 1973 to consider the abortion problem. This is so for several reasons.[8]

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[8] Professor Wardle has set these out in a more expanded form in Wardle, *Rethinking* Roe v. Wade, 1985 B.Y.U.L. Rev. 231, 236-45, which is followed in many details herein.

First, legal scholarship and caselaw have matured since 1973. The notion that a fundamental right of privacy included and protected a right to choose abortion was a novel idea when *Roe* was decided.[9] The idea that abortion laws might violate some constitutional principle had received little scholarly attention. One piece arguing such a view had been written in 1968,[10] but it was not even cited in *Roe*. Another article, written in 1971 by Means,[11] was the primary source of Justice Blackmun's historical and legal analysis. Such a paucity of legal scholarship was promptly remedied by the *Roe* decision itself, which unleashed thorough evaluation, debate, analysis, and criticism of the Court's constitutional analysis in *Roe*. Means' article was seriously challenged as to the validity of its history and analysis. *See* Destro, *Abortion and the Constitution: The*

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[9] *Id.* at 237.

> It should be remembered that prior to *Roe* abortion had been prohibited at common law, to a greater or lesser extent, for more than six centuries. 2. Bracton, *On the Laws and Customs of England* 341 (S. Thorne trans. 1968); 1 W. Blackstone, *Commentaries on the Laws of England* 129-30 (1783 & photo. reprint 1978). Those restrictions were a part of American common law when the Constitution was adopted. *See generally* J. Mohr, [*Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (1978)]; R. Perkins, *Cases and Materials on Criminal Law and Procedure* 25 (1969). During the 19th century common law abortion prohibitions were codified, many of them before or at the time the fourteenth amendment was adopted. *See Proposed Constitutional Amendments on Abortion: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94h Cong., 2d Sess. 5-30 (1976) (statement of Professor Joseph P. Witherspoon); J. Mohr, [*supra*], at 149-70. No substantial question about the constitutionality of abortion laws appears to have existed before 1968.

Id.

[10] Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. Rev. 730 (1968).

[11] Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971).

Need For a Life Protective Amendment, 63 Calif. L. Rev. 1250, 1267-92 (1975); Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359, 379-89 (1979); Horan & Balch, "*Roe v. Wade*: No Justification in History, Law, or Logic," Connery, "The Ancients and the Medievals on Abortion: The Consensus the Court Ignored," Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," and Arbagi, "*Roe* and the Hippocratic Oath," in *Abortion and the Constitution: Reversing* Roe v. Wade *Through the Courts* (Horan, Grant & Cunningham eds. 1987). As of 1985, *Roe* had been the subject of more than two hundred law review articles. Wardle, *supra*, at 237 n.39. The flood of articles analyzing and rejecting or attempting to rewrite *Roe* continues to the present. Moreover, *Roe* and its analysis has become a standard topic of constitutional law treatises and has been covered in numerous books devoted to the subject. *Id.*

Roe also suffered in its analysis because of a paucity of case law, refining the analysis, in lower courts. *Roe* was able to cite seventeen cases, many dealing with collateral areas such as vagueness not the privacy doctrine itself. *Id.* Today there exists a substantial body of case law in the Supreme Court and well over two hundred and fifty abortion cases in lower federal courts. *Id.* at 238-39 n.41. Moreover, the small number of cases available at the time of the *Roe* opinion were not "a carefully ripened, balanced body of judicial doctrine in which the constitutional aspects of abortion had been carefully considered from different perspectives," but they were part of a "loosely coordinated 'flood of litigation'" initiated in 1968 and 1969 to bypass the process of legislative consideration. *Id.* at 239.

Second, related legal doctrines have been clarified since 1973, some of which "exacerbated the abortion dilemma" and "distorted the Court'd perception of the constitutional interests involved." *Id.* In 1973, the stigma of unwed motherhood was a powerful factor,[12] unlike today where national celebrities

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[12] *See generally* Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. Rev. 1125, 1137-59 (1981). Discrimination in education and government benefits also existed. Wardle, *supra*, at 240; *Holt v. Shelton*, 341 F. Supp. 821 (M.D. Tenn. 1972) (re high school regulation barring unwed parents from extracurricular activities).

and common folk alike regularly resort to the practice. In 1973, illegitimacy led to legal inferiority.[13] Unwed fathers were expected to assume few responsibilites and had few rights.[14] Little legal recognition or provision was made for single parents.

The result of these "intolerant laws and customs" was a "cruel trap," often leading to recourse to abortion. Wardle, *supra*, at 240. The plight[15] of such women was placed center stage in the abortion debate and in the opinion of *Roe* itself. 410 U.S. at 153.

Today, however, the context is significantly different. The Court has, since 1971, considered the constitutionality of the laws creating such pressures. Wardle enumerates some of the changes since 1971:

> Women's rights and stature have generally been enhanced by the Court. Laws discriminating against pregnant women have been invalidated or amended. The Court has established that the Constitution does not shelter laws or government practices that discriminate against children born out of wedlock or their unmarried mothers. The Court has recognized the parental rights of unwed fathers

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[13] *See, e.g.*, H. Clark, *Law of Domestic Relations* 155-80 (1968); H. Krause, *Illegitimacy: Law and Social Policy* 21-42 (1971); Turton, *Unequal Protection of the Illegitimate Child*, 13 S. Tex. L.J. 126 (1971); Note, *The Rights of Illegitimates Under Federal Statutes*, 76 Harv. L. Rev. 337 (1962).

[14] *See* H. Clark, *Law of Domestic Relations* 176-77 (1968); Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. Fam. L. 231 (1971).

[15] "Ironically, the Court itself was not and is not without some responsibility for perpetuating the harsh laws and customs that by 1973 were pushing growing numbers of desperate women into the tragedy of abortion." Wardle, *supra*, at 240 & n. 50 (citing *Labine v. Vincent*, 401 U.S. 532 (1971) which, less than two years before *Roe* upheld denying illegitimates the right to inherit, even where the deceased had acknowledged paternity, and *Reed v. Reed*, 404 U.S. 71 (1971), in which, finally in 1971, the Court recognized that a law discriminating against women violated their equal protection right.).

> and emphasized their familial and support duties. The Court has even facilitated access to contraceptives. Yet, ironically, while it has done much to abolish the stigma of birth out of wedlock, the Court has created a whole new class of illegitimates. The unborn are subject to the most invidious form of discrimination: denial of legal protection for their very lives. *Roe* set this new illegitimacy beyond the reach of legislative reform.

Wardle, *supra*, at 240-41 (citations omitted).

Third, the Court is also in a better position today to consider the abortion dilemma because of more advanced scientific knowledge about unborn life and a clear view of the legal and societal implications of recognizing an abortion privacy right. *See generally* Wardle, *supra*, at 241-44 & nn.57-63. Reproductive technology has expanded dramatically, the unborn are now medically treated as patients, their humanity and responsiveness to painful stimuli has become common knowledge. Such knowledge was not widespread in 1973. *Id.*

Moreover, the past fifteen years of experience with a broad abortion right have damaged society. There has been an avalanche of abortions, well over twenty million since 1973 in the United States alone. After the Court placed its perceived imprimatur on abortion, it came to be treated by many women, not as a "profound, troubling, and sensitive dilemma" but as "an ordinary matter 'much like elective cosmetic surgery.'" *Id.* at 242 (quoting R. Benson, *Current Obstetric & Gynecological Diagnosis & Treatment* 550 (5th ed. 1984)). Fundamental values of our civilization and democratic system have been neglected, such as the prevention of violence and protecting the weak, vulnerable members of our society. Abortion certainly entails violence against innocent human life. "Are there no risks to a democratic society posed by the raising of a generation that has accepted the practice of killing defenseless victims to avoid personal inconvenience?" *Id.* at 260. Troubling effects of *Roe* have been widely perceived in such areas as prenatal fetal experimentation, treatment of premature and handicapped newborns, active euthanasia and infanticide, and a

growing epidemic of postnatal child abuse. *See id.* at 242-43, and sources cited therein.

Fourth, it can now be seen, as it could not be in 1973, that segments of the medical profession have been engaged in exploitive practices, offering little or no counseling in clinics that depend on a steady stream of abortions for their livelihood, operating in assembly-line fashion, and remaining oblivious to the very real pressures often placed on teens to have abortions — a radically different picture, from that painted in *Roe* of the patient, objective, disinterested family doctor looking out for the best interests of his patient and carefully explaining all the facts, options, and risks. *See generally id.* at 244-45 and sources cited therein.

In sum, so much of relevance to judicial consideration of the abortion dilemma has changed in the past fifteen years that this Court is in a far superior position to consider that dilemma than was the *Roe* Court of 1973. Given the pernicious results of *Roe* and the unparalleled scholarly outcry against the work of this Court in *Roe*[16] a reconsideration of *Roe* employing the improved illumination cast on the subject is appropriate.

B. THE BALANCING OF COMPETING INTERESTS REQUIRED IN THE CONTEXT OF THIS CASE IS MORE PROPERLY AND EFFECTIVELY THE SUBJECT OF STATE LEGISLATIVE ACTION.

Roe v. Wade has been criticized by Archibald Cox as "read[ing] like a set of hospital rules and regulations, whose validity is good enough this week but will be destroyed with new statistics." A. Cox, *The Role of the Supreme Court in America* 113-14 (1976). This has proven to be the case. The trimester scheme set out with bright lines in *Roe*, 410 U.S. at 162-66, became blurred in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1976). Justice O'Connor noted the failure of the Court to apply "neutral principles" and

[16] Some of these results and criticisms are given in the petition by the Guardian Ad Litem herein. *See* Petition of Guardian Ad Litem at 19-26.

its reliance on an analytical framework that "varies according to the 'stages' of pregnancy" and "the level of medical technology available when a particular challenge to state regulation occurs." *Id.* at 452 (O'Connor, J., dissenting). She observed that the lines had become "blurred" and that "[t]he *Roe* framework . . . [was] clearly on a collision course with itself." *Id.* at 455, 458.

Justice O'Connor commented on the basicly legislative work of the Court in its abortion jurisprudence:

> It is . . . difficult to believe that this Court, without the resources available to those bodies entrusted with making legislative choices, believes itself competent to make these inquiries and to revise these standards every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate medical procedure in this area.

Id. at 456.

The result of the *Roe* Court's venture into legislation has been the necessity of revising *Roe*'s legislative prescription to keep pace with changing circumstances. Thus, we find this Court attempting to do the work for which legislatures are equipped and designated in our Republic, rather than engaging in the comparatively timeless considerations of constitutional principle based upon neutral principles in which the Court normally and more properly engages.

The spectacle of the Supreme Court of the United States poring over the latest medical pronouncements to determine whether abortions may be performed in clinics this year instead of hospitals, as last year, *cf. Roe*, 410 U.S. 163-64 ("Examples of permissible state regulation [include] the facility in which the procedure is to be performed, that is whether it must be a hospital . . . ."), *with Gary-Northwest Indiana Women's Services v. Bowen*, 496 F. Supp. 894 (N.D. Ind. 1980)("the express language of *Roe* mandates that Indiana's second trimester hospitalization requirement be found . . .

constitutional"), *summarily aff'd sub nom. Gary-Northwest Indiana Women's Services v. Orr*, 451 U.S. 934 (1982), *and Akron*, 462 U.S. at 435-37 (ruling unconstitutional a hospitalization requirement), is disconcerting, at least. So is the decision to move the end of the first trimester from about twelve weeks of gestation, as in *Roe*, to sixteen weeks, *Akron*, 462 U.S. at 436, or, maybe, eighteen weeks, *id.* at 437, — it becomes difficult to keep track of the Constitution in its constant perambulations.

In the separation of powers established in our federal Constitution, it is not clear that it is the task of this Court to act as a super medical board for the country. That sort of task, where regulation of the medical matters is required, has been given to the legislature. Increasingly fine hair-splitting, as required in abortion jurisprudence, does not become the judiciary.

The result of the current approach is that the lower federal appellate courts courts are now wrestling with petty issues such as whether a forty-eight hour waiting period for minors seeking abortion is constitutional (upheld in *Hodgson v. Minnesota*, No. 86-5423, slip op. (8th Cir. Aug. 8, 1988)(en banc)) or whether it should be twenty-four hours (struck down in *Akron Center for Reproductive Health v. Slaby*, No. 86-3664, slip op. (6th Cir. Aug. 12, 1988)), or no hours. Seven cases to date have engaged this Court in attempting to fine-tune the permissible regulation of minors seeking to abort. *Danforth*, 428 U.S. 52; *Bellotti v. Baird (I)*, 428 U.S. 132 (1976); *Bellotti v. Baird (II)*, 443 U.S. 622 (1979); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Akron*, 462 U.S. 416; *Planned Parenthood Association of Kansas City v. Ashcroft*, 462 U.S. 4766 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169. No respite appears likely in the near future from the required judicial pursuit of hair-splitting.

It is for this reason that legislatures have historically been expected to attend to this sort of matter. They are not bound by "case or controversy" requirements or rules of evidence and procedure. They may hold hearings, appoint advisory panels,

employ researchers, experiment, and revise their views without concerns of stare decisis.

John Hart Ely wrote shortly after *Roe* was decided: "[P]recisely because the claims involved are difficult to evaluate, I would not want to entrust to the judiciary authority to guess about them — certainly under the guise of enforcing the Constitution." Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 935 n.89 (1973). Justice Frankfurter, some four decades before *Roe*, criticized:

> the imposition by judges of their private notions of social policy [on the states] because it so often turns on the fortuitous circumstances which determine a majority decision and shelters the fallible judgment of individual Justices, in matter of fact and opinion not peculiarly within the special competence of judges, behind the impersonal dooms of the Constitution.

F. Frankfurter, *The Public and Its Government* 49-51 (1930).

In the instant case, a balance must be struck between the interests of a woman demanding an abortion, even though her physician has determined that one is not necessary for her well-being, and the interests of her husband, desiring that his interests, along with the life of his child, not be sacrificed to less weighty interests. Likewise, the Guardian Ad Litem requests a balancing of interests relating to the unborn child. This sort of balancing, in an area of great public concern subject to expected and common changes of circumstances, has historically been entrusted to the legislature, where the ability of legislation to be amended by subsequent legislation and to be interpreted by the courts offers marked advantages over nearly inalterable constitutional law.

Roe should be reconsidered in light of these advantages of the legislative approach over the constitutional law approach to the major problems of the day, in light of this Court's better position to do so now, and in light of the unforeseen pernicious effects which flow from *Roe*, especially should this Court find that abortion law now countenances abortion on demand.

CONCLUSION

WHEREFORE, petitioner Carlton James Lewis respectfully prays this Court to issue a writ of certiorari to review the decision of the Michigan Court of Appeals.

Respectfully submitted,

Thomas J. Balch
Counsel of Record
Steven W. Moss
Counsel for Petitioner

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(313) 230-0080

Appendix

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Order

Entered: September 22, 1988

Michigan Supreme Court
Lansing, Michigan

Dorothy Comstock Riley
Chief Justice
[list of justices omitted]

84149

SHAWN KATHLEEN LEWIS,

Plaintiff-Appellee,

v

SC: 841469
COA: 111440
LC: 88-159036-DM

CARLTON JAMES LEWIS,

Defendant-Appellant,

and

GENE MEYERS,

Guardian *ad litem* — Appellant.

Pursuant to this Court's order of September 15, 1988, the parties have filed additional pleadings in order to assist us in deciding whether to grant leave to appeal. We have considered those pleadings and the original application and motions, the Court of Appeals order dated September 15, 1988, and the orders of the trial court.

On order of the Court, the motions for immediate consideration are considered, and they are GRANTED. The applications for leave to appeal are also considered, and they are DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

The motions for stay are also considered. The stay provided for in this Court's order of September 15, 1988, is EXTENDED until 5:00 p.m. Monday, September 26, 1988. In all other respects, the motions for stay are DENIED.

The motion for special admission of foreign counsel is also considered, and it is GRANTED.

SEAL

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

September 22, 1988 /s/ _____

Corbin R. Davis
Clerk

Court of Appeals, State of Michigan

ORDER

Donald E. Holbrook, Jr.
Presiding Judge

William R. Beasley
Elizabeth A. Weaver*
Judges

SHAWN K. LEWIS v CARLTON J. LEWIS

Docket
111440

L.C. # 88 159036 DM

The Court orders that the motion for immediate consideration is GRANTED.

The Court orders pursuant to MCR 7.205(D)(2) that the lower court's injunction is DISSOLVED, because the injunction interferes with plaintiff's constitutional rights as set forth by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113; 93 S.Ct. 705; 35 L.Ed.2d 147 (1973), and *Planned Parenthood of Central Missouri v. Danforth*, 438 U.S. 52; 96 S.Ct. 2831; 49 L.Ed.2d 788 (1976).

The motion to appear and practice is GRANTED.

The motion for immediate consideration of the motion for stay is GRANTED.

The motion to stay the effect of this order is GRANTED and this order is STAYED until 5:00 p.m. Monday, September 19, 1988. No additional bond is required.

This Court retains no further jurisdiction.

*Judge Weaver concurs and states:

The law of the United States Constitution as announced by the United States Supreme Court is binding on trial courts and on appellate courts. That law can be changed in only two ways:

1. The United States Supreme Court can change its opinion;

2. Three-fourths of the state legislatures or state conventions called for said purpose can ratify an amendment to the United States Constitution proposed by two-thirds of both Houses of the United States Congress or proposed by a constitutional convention applied for by two-thirds of the state legislatures. (See U.S. Const. art. V).

The law of the United States Constitution as declared by the United States Supreme Court is clear in this matter. The United States Supreme Court wrote in *Roe v. Wade*, 410 U.S. 113, 163; 93 S.Ct. 705; 35 L.Ed.2d 147, 182 (1973):

> "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, 35 L.Ed.2d 174, 175, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. . . .
>
> "*This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine,* ***without regulation by the State,*** *that, in his medical judgment,*[1] *the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effecuated by an abortion* ***free of interference by the State.***

---

[1] In *Roe v. Wade*, *supra*, at 35 L.Ed.2d 177, the United States Supreme Court listed factors involved in the physician's "medical judgment." The Court wrote:

> "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment

(Footnote continued)

> "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb . . . . If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." (emphasis added)

In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52; 96 S.Ct. 2831; 49 L.Ed.2d 788, 803 (1976), after noting that *Roe v. Wade* clearly established that "the State may not restrict the decision of the patient and her physician regarding abortion during the first stage of pregnancy," the Supreme Court held that "the State may not constitutionally require the consent of the spouse . . . as a condition for abortion during the first 12 weeks of pregnancy." *Id.* at 805. The Supreme Court said that "the State cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.'" (citation omitted).

The trial court concedes at page 11 of its opinion that its injunction does constitute state action. That state action violates the law announced in *Roe v. Wade*, *supra*, and *Planned Parenthood of Central Missouri v. Danforth*, *supra*.

Footnote 1 continued

> that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it . . . . [T]he additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation."

Although the issue of abortion raises important moral questions, such questions are not applicable to the decision here. Judges are sworn to uphold the Constitution and laws of the United States. They must apply the law of the United States Constitution as announced by the United States Supreme Court.

For the preservation of a society of laws, not of men, trial courts or appellate courts have no authority to change the law of the United States Constitution as announced by the United States Supreme Court.

SEAL

A true copy entered and certified by Ronald L. Dzierbicki, Chief Clerk, on September 15, 1988

/s/ _____

Ronald L. Dzierbicki
Chief Clerk

A TRUE COPY
John H. Trecha, Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF GENESEE

SHAWN KATHLEEN LEWIS,

Plaintiff,

vs.

CARLTON JAMES LEWIS,

Defendant.

File No. 88-159036-DM

Judge V. Washington

STIPULATED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Arthur C. Swirtz
Attorney for Plaintiff

Steven Moss
Attorney for Defendant

Linda Pylypiw
Shelly Spivack
Attorneys for ACLU

STATEMENT OF FACTS

See Stipulated Facts

Preliminary Statement

A document was presented to the Court at 5:00 p.m. on August 9, 1988 under the format of the spouse abuse injunction set forth in Michigan Compiled Laws 600.2950 and 552.14.

Time being of the essence in terms of the scheduled abortion, the Court signed the injunction in the obvious wrong form to prevent the abortion the following day. Apparently the injunction was served on a number of individuals and the abortion did not occur.

On or about August 17 the Court was contacted by Linda Pylypiw indicating that she was about to enter an Appearance

on behalf of Mrs. Lewis on the issue of the abortion and that she would be working with the American Civil Liberties Union and Attorney Shelly Spivack. A discussion was held in chambers with Attorney Pylypiw and Attorney Moss and it was determined by representations of Attorney Pylypiw that the first pregnancy for Mrs. Lewis had been very difficult and she had been advised medically not to have any more pregnancies. The Court advised Ms. Pylypiw that if this in fact was supported by medical documentation that the restraining order or the injunction would be dissolved on Friday, the 19th before the Court left for an anticipated ten (10) day vacation.

On Friday, the 19th, at approximately 3:00 p.m. Attorney Moss was present in the Court chambers and Ms. Pylypiw was on the speaker phone and it was determined that in fact there was no such medical documentation and the doctor in fact said that it was specifically a social decision as opposed to a medical decision to terminate the pregnancy.

At that time the Court offered Ms. Pylypiw a hearing relative to the issues of whether or not the preliminary injunction/temporary restraining order ought to be dissolved and it was decided that the anticipated return date of the Court of September 6 would be in plenty of time in terms of her client's physical condition to have a decision of the Court on the issue of dissolving the injunction. That being so the Court had no further contact with the case until September 6 when the parties convened at 3:30 p.m. for purposes of a decision. In the interim Briefs were filed on behalf of the Plaintiff and the Defendant as well as a Reply Brief by the Plaintiff. There are some unresolved questions as it relates to the conduct of the parties in this case. In particular they are as follows:

1. How was it that Mr. Lewis found out about Mrs. Lewis being pregnant?

2. Why did Mrs. Lewis share that information with anyone other than her physician when she realized that in fact she was pregnant?

3. Why didn't Mrs. Lewis simply have an abortion rather than talking it over with her husband?

4. Why didn't her attorney of record advise Mrs. Lewis that she could avoid the Court's jurisdiction by voluntarily dismissing her divorce action?

5. Why did Mr. Lewis seek to intervene and prevent Mrs. Lewis from having an abortion — what was his underlying motivation — is this a means of leveraging against the divorce, is this a tactic to prevent her from having the divorce which he obviously does not want.

6. How is that both the parties were able to reconcile periodically without filing a notice a [sic] reconciliation with the Court as provided by 3204(C)?

This failure to inform the Court of the reconciliation is not dispositive of the jurisdictional issue but is certainly something that a higher court may review if it wants and it is merely being pointed out to show that this Court recognizes that there may be jurisdictional ups and downs in this case.

As to the form of the Order that was originally entered it should be redrafted to comply with MCR 3.203 and 3.310 and in particular it should give notice that a hearing will be held relative to whether or not that Temporary Restraining Order should become a Preliminary Injunction on September 6, 1988 @ 3:30 p.m. In particular 3.310(c).

There was a stipulation as to the Statement of Facts set forth above so as to obviate the need for an evidentiary hearing relative to the Court's obligation to make findings of fact.

THE ISSUE PRESENTED

DOES THE STATE CIRCUIT COURT HAVE JURISDICTION AND AUTHORITY TO ENTER AN INJUNCTION PROHIBITING THE FEMALE PARTY IN A PENDING DIVORCE ACTION FROM HAVING AN ABORTION OF A CHILD CONCEIVED BETWEEN THE PARTIES DURING THE PENDENCY OF THE DIVORCE ACTION?

DISCUSSION

The Court's jurisdiction in divorce matters is by function of Statute and our actions are interpreted and directed by Com-

mon Law and Michigan Court Rules. We as trial Court's are not free to allow our personal views to interview [sic] with that which we must do according to the divorce practice within the State of Michigan. That being so, I at this point reference the pertinent divorce statutes and they are MCLA 552.6 where it sets forth the "no-fault" language which must be contained in the Complaint for Divorce and that is specifically that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. It is interesting to note that that same statute in section 1 prohibits the Plaintiff from making any further explanation for the grounds for divorce. At the same time it is set forth in the Michigan Rules of Court under Rule 3.204(a) that the following material must be contained in the Complaint for Divorce:

1. The complete names of the parties and their names before the marriage;

2. The complete names and the dates of birth of any minor children of the parties or children born during the marriage;

3. That their are no minor children of the parties or minor children born during the marriage, if there are none;

4. That the female party is pregnant, if she is;

5. The grounds for divorce or separate maintenance in the statutory language without further particulars;

6. The statutory residence requirements; and

7. Whether there is property to be divided.

It is also interesting to note that as it relates to divorce practice under the instructions that this Court was given at the new Judge's seminar between January 5 and 9, 1987, by the Michigan Judicial Institute that in a specific outline handed out

it was set forth that the proof requirements once the divorce got to Judgment stage should include the following:

1. Jurisdiction;
2. Validity of marriage;
3. Statutory grounds;
4. Whether female is pregnant.

At a special problems outline, page 11.

The divorce statute also goes onto [sic] to speak as to the power of the Court specifically at MCLA 552.12 when it says:

> Suits to annul or affirm a marriage, or for a divorce, should be conducted in the same manner as other suits and courts of equity; and the Court shall have the power to award issues, to degree [sic] costs, and to enforce its decrees, as in other cases.

The divorce statute further continues with the responsibilities of the Court as it relates to the care, custody and support of minor children during the pendency of the action when it states at section MCLA 552.15:

> After the filing of a complaint in an action to annul a marriage or for a divorce or separate maintenance, on the motion of either party or the Friend of the Court, **or on the Court's own motion,** the Court may enter such orders concerning the care, custody, and support of the minor children of the parties during the pendency of the action as the Court considers proper and necessary . . .

Further, the divorce statutes specifically speaks to the Court's requirement upon the entry of Judgment as relates to minor children and it says specifically at MCLA 552.16:

> Upon annuling [sic] a marriage or entering a Judgment of Divorce or Separate Maintenance, the Court may enter such orders as it considers just and proper concerning the care, custody, and support of the minor children of the parties . . .

It appeared that at one point there was a section specifically giving the types of evidence necessary for the taking of a divorce decree and those sections were MCLA 552.40 to 552.42. These were repealed by Public Act of 1961 No. 75, Section 2 effective January 1, 1972.

It is also a requirement that when the issue of custody is raised in any divorce action that the Child Custody Act of 1970 comes into play and that is found at MCLA 722.21. Of particular note is the section that defines "child" under that act, is [sic] as follows. That is found at MCLA 722.22(2)(a): "Child" means minor child and children.

The statute then goes on to define the best interests of the child being the sum total of a group of factors which must be evaluated and determined by the Court and they are found specifically at MCLA 722.23.

The Child Custody Act also requires that the Court make certain determinations as it relates to the rights of the children and that is found specifically at MCLA 722.24 wherein the statute says:

> In all actions now pending or hereafter filed in a Circuit Court involving dispute of custody of a minor child the Court shall declare the inherit [sic] rights of a child and establish the rights and duties as to custody, support, and visitation of a child in accordance with this Act.

The Child Custody Act further requires that the Court give liberal construction to the application of the Act specifically at MCLA 722.26 it says:

> The provisions of this Act being equitable in nature shall be liberally construed and apply [sic] to establish promptly the rights of the child and the rights and duties of the parties involved. This Act shall apply to all Circuit Court child custody disputes and actions whether original or incidental to other actions . . .

Along the same line as it relates to whether the Courts in Michigan and the legislature have looked to the issue of defin-

ing when a fetus becomes a person or a child or whether that child in utero has certain rights has been addressed by the Michigan Supreme Court in the case of *Tyler v. Tyler*, 348 Mich. 169 (1957). The issue in the *Tyler* case was whether or not the Plaintiff, a service man on leave who filed for divorce from his wife, and then withheld the fact that she was pregnant from the Court during the taking of the proofs and then departed for overseas duty could have the Judgment set aside with a provision made for a child who was in fact conceived during that leave. The trial Court made a finding that a man could not come in and submit himself to the Court's jurisdiction and then withhold the fact that the wife was pregnant from the Court and then object to the re-opening of the divorce decree. Specifically, the issue in the *Tyler* case was whether or not the decree could be set aside for the child that was not yet born. The issue was handled by the Court when it stated at page 172:

> We find it unnecessary to consider the various legal points Plaintiff has posed in his Brief. **This is a case where the Court below was under continuing duty to provide for the rights as well as the maintenance of the expected child.** Having been promptly apprised of an urgent fact not theretofore made known to him, that an only child of parties was due for birth without provision for such child having been made in the decree — the chancellor was duly empowered by the motion as filed and served on counsel of record to vacate the decree and its supporting order pro confesso. **Indeed, if he had been so minded, the chancellor for an abundant reason could have ordered a rehearing on his own motion.** *Tyler v. Tyler*, 348 Mich. 169 at 172. Emphasis supplied, citation omitted.

There is further finding in the Statutes of Michigan that an unborn person is to be given certain rights specifically in the Revised Judicature Act found at MCLA 600.2045 Section 1:

> If in an action or proceeding, other than one in Probate Court, it appears that a person not in being may become entitled to a property interest, real or personal, legal or equitable, involved in or affected by the action or proceeding, and the interests of the unborn person is not or cannot

> otherwise properly be represented and protected, the Court, **upon its own motion,** or upon the motion of any party, may appoint a suitable person to appear and act of [sic] Guardian Ad Litem of the unborn person. The Guardian Ad Litem is authorized to engage counsel and do whatever is necessary to defend and protect the interests of the unborn person. A Judgment or order made after the appointment shall be conclusive upon the unborn person for whom a Guardian was appointed.

I have taken the time to enumerate the standards set forth under divorce proceedings because I think it is very important in a case that deals with the highly emotional issue of abortion to set the parameters so that people know exactly what is being ordered, and what is not being ordered.

The Plaintiff in this case is raising several issues in her Brief. She states that she one was served with an imperfect order. That has [sic] conceded and will be corrected in short order. However, the substantive arguments are that there is no right on behalf of the State to interfere in the decision to terminate a pregnancy during the first trimester. She relies heavily on *Roe v. Wade*, 410 U.S. 113; 93 S.Ct. 705; 35 L.Ed 2d 147 (1973), which according to Plaintiff held that a woman's decision whether or not to terminate her pregnancy is protected by the right of privacy founded in the 14th Amendment of the United States Constitution and no State may interfere in that decision. That interpretation is an overly broad reading of what was found in *Roe v. Wade*. I went through and re-read that case several times and its holding specifically states that a State may not set forth criminal abortion statutes that are overly broad in nature, that is not making a distinction between the first trimester and second and third trimesters of a woman's pregnancy and it speaks specifically to State regulation by way of statute. The only issue or the only section of the holding which may give some basis to Plaintiff's position is that set forth at Subsection A which states:

> For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must

be left to the medical judgment of the pregnant woman's attending physician.

That section of the holding if taken out of context would appear to abrogate the finding in *Tyler v. Tyler, supra*, and the provisions of MCLA 600.2045 as well as the inferential responsibilities placed in the trial Court by the Child Custody Act of 1970 and the divorce statutes, and Michigan Court Rule 3.204.

However, if that Subsection is read in the total context of the decision it is clear that the high Court was speaking of statutory regulation and not merely State action. A position that Plaintiff makes in her Brief at page 10 is that the State Court injunction does constitute State action, that is not disputed by this trial Court. This trial Court's position is that it is caught in a quandry between the United States Supreme Court, and its decision in *Roe v. Wade* whether or not it applies to actions by the judiciary since that was not specifically addressed, the findings in *Tyler v. Tyler* that the Court was under a continuing duty to make provisions for the expectant child; indeed in the *Tyler* case in the research headnote which is not cited for authorative purposes but merely for research availability including shepardizing, it is interesting to note that the holding is set forth as earlier recited, but there is also a reference to Court Rule No. 28 Section 4 (1945) which would indicate again an existing Supreme Court Court [sic] Rule governing the issue of unborn children.

The issue of whether or not *Roe v. Wade* specifically overruled the holding in *Tyler v. Tyler* was addressed at least in this Court's mind by the Shepardizing of the *Tyler* decision. Obviously, *Tyler* was an earlier decision than *Roe v. Wade* and if in fact it was overruled by that narrow Subsection A of the Supreme Court's holding then indeed that would have been set forth in the *Shephard's* citations. That is not found by this Court on its review of the citations. Thus, the most logical conclusion is that the United States Supreme Court was addressing the issue of the State regulation in the form of Statute and not addressing the issue as it related to a Common Law decision.

The Defendant makes an interesting observation in terms of how a child is defined, however, as we see in the Child Custody Act, a child has a very broad definition. If we take the ordinary meaning as found in Webster's Third New International Dictionary Unabridged 1961 Edition, adopted from page 9 of Defendant's Brief, we note that unborn or recently born human beings are defined as "children". This was apparently reaffirmed in Webster's Ninth New Collegiate Dictionary of 1974, "an unborn or recently born person". Apparently this was further adopted in Black's Law Dictionary Fifth Edition 1979 which defines child as an unborn or recently born human being.

It is clear to this Court that there has to be some sort of willingness by the highest Court in the State of Michigan and perhaps the United States Supreme Court to address the issue of divorce law and the responsibility of the Court verses [sic] the private rights of the individuals. In this Court's view this is not a case of mother's right to terminate pregnancy verses [sic] father's rights to veto pregnancy, thus I have not addressed the issues set forth in the *Planned Parenthood v. Danforth* case (citation omitted).[1] I don't think that is the issue here. As I look at the issue the parties in this case submitted themselves to the jurisdiction of the Court under the cloak of the Divorce Statute, Common Law, and Michigan Court Rules. Once that occurred an additional responsibility was placed on the Court to look into the interests of any minor children that the parties may have. Clearly, the parties did not at the time of filing have more than one minor child. As this Court is able to research it, on short notice, it appears that there is a wide open view as to what constitutes a child. Under present Michigan Law, statutory, case law, and Court rule. [sic] Why would the Michigan Court Rules, as set down by the Michigan Supreme Court make counsel place in the Complaint whether or not the female is

[1] Nor the other issues raised by Plaintiff in her Brief as I do not feel they need to be addressed within the narrow context of this Court's Opinion, as to the issue presented for analysis.

pregnant? Why, if there is to be no intervention would the Judicial Institute tell new Judges as of 1987 that they must have proof that the female is not pregnant? These questions are not answered directly. They need to be!

People should know specifically how the legislature is defining a minor child. Conversely, they need to know why and whether or not there will be intervention on behalf of the Court if a child is conceived during the course of a marriage. This is not the case where the parties were estranged and there was a conception by someone other than the parties. This is a case that falls, in this Court's view squarely within the jurisdiction of divorce proceedings, and this Court is going to preserve the status quo until it is given direction from a higher court, preferably the Michigan Supreme Court as it is their Court Rule that inferentially gives the trial Court the responsibility to look after the interests of an unborn child, and their earlier *Tyler* decision that says there is a continuing duty as it relates to the rights and maintenance of an expected child, but gives no definition of that duty.

I am not getting into the issue of how other areas of Michigan Law treat the fetus. Although I do note for the record that it appears that there is some consideration of what happens to a child in utero as was decided *in the Matter of Baby X* [,] 97 Mich. Appeals 111 (1980), and in the tort area as set forth in *Womack v. Buchhorn*, 384 Mich. 718 (1971), and *O'Neal* [sic] *v. Morris*, 385 Mich. 130 (1971), and it appears that at least that at one point one of the Supreme Court Justices was of the opinion that there needs to be a judicial determination of personhood of the unborn. See *Kilpatrick v. St. Joseph Hospital*, (Docket #61528). That would have been specifically Justice Ryan in a dissenting Opinion on that application found at 409 Mich. 868, wherein he says:

> Judicial determination of the personhood of the unborn is a vitally important question of highest juris prudential [sic] significance. The law on this question is unclear and apparently contradictory. See *Tunnicliffe v. Bay City's*

Consolidated Rail Co. 102 Mich. 624; 61 N.W. 11 (1894); *O'Neal* [sic] *v. Morris*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Toft* [sic] *v. Goree*, 65 Mich. Appeals 296; 237 N.W.2d 297 (1975); *Roe v. Wade*, 410 U.S. 113; 93 Sup. Ct. 705; 35 L.Ed.2d 147 (1973).

In that case the issue was whether or not a thirteen week old fetus was a person. If so, then he felt that further oral argument and briefing were indicated. Because the question was whether or not the mother and father in a common law negligence action could claim damages for the loss of society and companionship of a thirteen week old fetus which was aborted due to alleged negligently [sic] injury inflicted by the Defendant upon Plaintiff mother and proximately causing the abortion.

CONCLUSION

As all can see this is not a case where we have simply two people who happen to create a fetus. What we have are two people who have come under the jurisdiction of the Divorce Statutes, Case Law, and Court Rules. Because of that, they are in a unique position as it relates to the issue of terminating a pregnancy. As this Court reads the various cases, and statutes, and Court Rules, the inference is quite clear, if not the absolute direction, and that is, if there is a child conceived during the term of the marriage while the divorce is pending that divorce cannot be concluded until provisions are made for that child. Specifically, when you look at the Revised Judicature Act, MCL 600.2045, the issue becomes whether or not that child once conceived then is entitled to birth without outside interference.

That question is not one which apparently has been posed or answered in any case that this Court is able to research and uncover. Because of that, I am not dissolving the Temporary Restraining Order of 8/9/88. I am making it a Preliminary Injunction from this point forward directing that the form of the original Injunction be modified to resemble that of a Tempo-

rary Restraining Order Nun [sic] Pro Tunc to August 9, 1988, and will gladly certified [sic] this issue to the higher Appellate Courts, at the parties [sic] pleasure to the Court of Appeals, more appropriately to the Michigan Supreme Court.

Further, I hereby appointed Attorney Gene Myers as Guardian Ad Litem for this child during the pendency of this matter.

IT IS SO ORDERED, AND THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL THERE BEING NO JUST CAUSE FOR DELAY.

/s/ _____
Valdemar L. Washington
Circuit Court Judge

Dated: September 6, 1988

VALLEY MEDICAL CENTER
John L. Stoker, D.O.
5142 Miller Rd.
Flint, Mi. 48507

NAME: Cari Rund

DATE: 8-18-87

Totally Incapacitated: _____

Partially Incapacitated: X

From _____ Thru _____

It is in general
agreement with a medical
decision for a trip
with this patient.

SIGNED: John L Stoker DO

JOHN L. STOKER, D.O.

88-683

Nos. 88-555, 88-

Supreme Court, U.S.
FILED
NOV 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

GENE MYERS, Guardian Ad Litem,

Petitioner,

—v.—

SHAWN KATHLEEN LEWIS,

Respondent.

CARLTON JAMES LEWIS,

Petitioner,

—v.—

SHAWN KATHLEEN LEWIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should refuse to decide, on the facts of this case, if *Roe v. Wade* and its progeny held that only certain medically necessary abortions are constitutionally protected in the first trimester, given that the facts concerning the medical necessity of Ms. Lewis' abortion are in dispute, and no Michigan statute attempts so to restrict womens' freedom to choose abortion.

2. Whether this Court should overrule *Roe v. Wade* and its fifteen years of decisions reaffirming *Roe*, in this case.

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Respondent Shawn Lewis submits this brief in opposition to the Petition for a Writ of Certiorari filed by Gene Myers, guardian ad litem for the fetus, on September 30, 1988, as well as the Petition for a Writ of Certiorari filed by Carlton Lewis, Ms. Lewis' ex-husband, on October 21, 1988. Both Petitions seek review of the judgment entered by the Michigan Court of Appeals in this action.

COUNTERSTATEMENT OF JURISDICTION

The guardian ad litem does not have standing to bring this claim seeking to deprive Ms. Lewis of her constitutional right to choose to have an abortion; therefore his Petition must be denied. A guardian ad litem may have standing to raise some claims on behalf of a fetus, such as claims necessary to protect the property interests of a child that will be born.[1] This Court has made absolutely clear, however, that a fetus has no "right to life" and thus no basis for invoking the power of the state to interfere with a woman's decision to have an abortion. The Court has held unequivocally that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe v. Wade*, 410 U.S. 113, 158 (1973). This holding is consistent with case law even before *Roe* establishing that fetuses are not persons under the Constitution. *See Abele v. Markle*, 351 F. Supp. 224, 228 (D. Conn. 1972), *vacated and remanded on other grounds*, 410 U.S. 951 (1973); *Klein v. Nassau County Medical Center*, 347 F. Supp. 496 (E.D.N.Y. 1972) (three-judge court), *aff'd in part sub nom. Ryan v. Klein*, 412 U.S. 924 (1973) (appeal by intervenors asserting interests of fetuses), *vacated & remanded in part sub nom. Commissioner of Social Servs. v. Klein*, 412 U.S. 925 (1973) (appeal by state); *McGarvey v. Magee-Womens Hosp.*, 340 F. Supp. 751 (W.D. Pa.

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1 Although the Michigan law upon which the trial court relied permits the appointment of a guardian to protect the *property* interests of a "person not in being," Mich. Comp. Laws Ann. § 600.2045 (1) (West 1981), there is no provision in Michigan state law that would permit the appointment of a guardian ad litem for a fetus in the circumstances of this case. Myers App. 13a.

1972), *aff'd*, 474 F.2d 1339 (3rd Cir. 1973); *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 286 N.E.2d 887 (1972), *appeal dismissed*, 410 U.S. 949 (1973); *see also Roe*, 410 U.S. at 157 ("[T]he appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment."). The lower federal courts have, of course, followed this Court's holding in *Roe*.[2]

Because a fetus is not a person under the Constitution, a guardian ad litem for the fetus obviously does not have standing to bring a claim.[3] "The law is clear that an unborn child is not a person under the Fourteenth Amendment of the United States Constitution and therefore the unborn child and persons acting in behalf of an unborn child may not assert the deprivation of any rights or privileges secured by the Amendment." *Poole v. Endsley*, 371 F. Supp. 1379, 1382-83 (N.D. Fla. 1974), *aff'd in part & remanded on other grounds*, 516 F.2d 898 (5th Cir. 1975) (citing *Roe v. Wade*); *see also Brady v. Doe*, 598 S.W.2d 338 (Tex. Civ. App. 1980), *cert. denied*, 449 U.S. 1081 (1981); *Rothenberger v. Doe*, 149 N.J. Super. 478, 374 A.2d 57 (1977).

Guardians ad litem for fetuses also have been denied standing to intervene and challenge a woman's right to choose abortion, even though the requirements of standing for purposes of intervention are more easily met than those for purposes of bringing a claim. *See Woe v. Bear*, No. H-79-1866 (S.D. Tex. May 5,

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2 *See, e.g., Ruiz Romero v. Gonzalez Caraballo*, 681 F. Supp. 123 (D.P.R. 1988); *Harman v. Daniels*, 525 F. Supp. 798 (W.D. Va. 1981), *Civic Awareness of Am., Ltd. v. Richardson*, 387 F. Supp. 1086 (E.D. Wis. 1975), *aff'd*, 532 F.2d 756 (7th Cir.), *cert. denied*, 429 U.S. 829 (1976); *Poole v. Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974), *aff'd in part & remanded on other grounds*, 516 F.2d 898 (5th Cir. 1975).

3 In order to have standing and satisfy the "case or controversy" requirement of Article III, a litigant must show that the interest sought to be protected by the complainant is arguably "within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 475 (1982) (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)); *see also Allen v. Wright*, 468 U.S. 737, 751 (1984).

1980) (order denying motion to intervene) (subsequent history on merits omitted); *Roe v. Casey*, No. 78-2214 (E.D. Pa. Dec. 11, 1978) (order denying motion to intervene) (subsequent history on merits omitted); *Margaret S. v. Edwards*, No. 78-2765 (E.D. La. Oct. 2, 1978) (order denying motion to intervene) (subsequent history on merits omitted); *Akron Center for Reproductive Health v. City of Akron*, No. C78-155A (N.D. Ohio May 16, 1978) (order denying motion to intervene in relevant part) (subsequent history on merits omitted); *Zbaraz v. Quern*, No. 77-C-4522 (N.D. Ill. May 15, 1978) (order denying motion to intervene) (subsequent history on merits omitted); *Ryan v. Klein*, 412 U.S. 924 (1973);[4] *Doe v. Bolton*, 319 F. Supp. 1048, 1057 (N.D. Ga. 1970) (three-judge court), *modified*, 410 U.S. 179 (1973).

Because the guardian ad litem can only claim the interests of the fetus he purports to represent, and the fetus is not a person under the Fourteenth Amendment, the guardian ad litem lacks the requisite standing under Article III to bring this claim.

COUNTERSTATEMENT OF THE CASE

Respondent Shawn Lewis, a battered wife, divorced petitioner Carlton Lewis on October 24, 1988. Ms. Lewis filed her complaint for divorce on January 20, 1988 in the Genesee County Circuit Court before the Honorable Valdemar Washington. Ms. Lewis sought a divorce because Mr. Lewis physically abused her, refused to contribute, financially or otherwise, to the support of their household, and repeatedly

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4 In *Ryan*, intervenors purporting to represent embryos and fetuses, appealed the ruling of a three-judge court holding unconstitutional New York's refusal to fund legal abortions. In a separate appeal by the state, the Court vacated the district court order and remanded the case for reconsideration in light of *Roe v. Wade*. *Commissioner of Social Servs. v. Klein*, 412 U.S. 925 (1973). On the intervenor's appeal however, the Court summarily affirmed the district court, indicating its refusal to recognize claims of purported guardians ad litem in abortion cases.

abandoned Ms. Lewis and their infant son Christopher. *See* App. 3a-4a.[5]

Ms. Lewis' first pregnancy, with Christopher, her one child, was extremely difficult. She was continually ill, suffering from high blood pressure, high blood sugar and kidney infection (for which she was hospitalized for a week), and was confined to her bed for much of the last three months of the pregnancy. App. 2a. Mr. Lewis was furious that the pregnancy made her sick. As Ms. Lewis told the county court:

> Carl [Lewis] left three times during the pregnancy for about two weeks each time. Just before Christmas 1986 he left. He said that he couldn't handle it that I couldn't go anywhere or do anything and that I was constantly ill. He went and lived with his brother; and, at that time, he stated that he did not want the child that I was carrying. I went to his brother's house and begged him to come back.
>
> He left again the end of January or beginning of February 1987. We were fighting because he wanted to go to his cousin's home, someone I didn't approve of because he is a heavy drinker and Carl was influenced by this cousin. I wanted him to stay with me; but, he told me to get out of the car and dropped me off by the overpass at Court Street and Dort Highway. I walked home in the snow, 7 months pregnant, in cowboy boots and a light jacket. I got about three blocks from home after I had walked almost two miles when he sent a friend, Joe Stevens, to pick me up. When I got home, Carl had taken all of his things and moved to his brother's.

App. 2a-3a.

After Ms. Lewis gave birth to Christopher, Mr. Lewis became physically abusive. A police complaint described one assault:

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5 Citations to Mr. Myers' Petition For A Writ of Certiorari will be in the form "Myers Pet. ___" and those to Mr. Lewis' Petition will be in the form "Lewis Pet. ___." Citations to the appendix to Respondent's Brief In Opposition will be in the form "App. ___," those to Mr. Myers' appendix will be in the form "Myers App. ___" and those to Mr. Lewis' appendix will be in the form "Lewis App. ___."

> [Ms. Lewis] states that her husband who moved out a week ago came over and started a fight with [Ms. Lewis]. [Mr. Lewis] hit [Ms. Lewis] on boths [sic] arms and left side. [Mr. Lewis] then push [sic] [Ms. Lewis] threw [sic] the screen door. [Mr. Lewis] then left.

App. 8a. As a result of this physical abuse, the court issued a preliminary injunction on April 18, 1988 ordering Mr. Lewis to "desist and refrain from beating, assaulting, or in any way harassing or physically abusing [Ms. Lewis]." Preliminary Injunction Under MCR 3.310, MCR 3.203(c) And Public Acts 316-318 of 1978, No. 88-159036-DM, at 2 (Apr. 18, 1988). Mr. Lewis continued to leave home for extended periods of time.

> [W]hen Christopher was born in April, when he was 5 weeks old—about May 24th, which is around the time he beat me up (a copy of the police report is attached), he left again. At that time, I was undergoing heart testing because my father had just had open heart surgery for a diseased valve which was hereditary. In addition, I had an infection in my tubes from the pregnancy.
>
> . . . .
>
> When Carl left that time, he went to his mother's for at least two weeks. Each time he was gone, he was gone about two weeks—long enough to get a full paycheck and spend it on himself. Then he would come back.
>
> After he came back home, he didn't have a lot of patience with the baby. . . . He . . . would want to go out after he got home from work. I couldn't go out because I would have to get up at 6 o'clock in the morning and take care of the baby. We fought a lot about that.
>
> I never left Carl alone with Christopher very often. . . . One time when I let [sic] him with Christopher, he let Christopher fall off the couch and badly scratched his head.
>
> Things were better until he left again November 1, 1987. He took our son trick-or-treating the night before and I thought everything was okay. He left and went to his mother's house. The next day he called my parents and

> told them that he no longer could handle it, that he didn't want the responsibility of Christopher and me, and to find someone else to take care of us. On November 2nd, I went down and filed for ADC.
>
> At that time, the heat bill was at least 2 months behind, the water was to be turned off, and the phone had been turned [off] because the bills hadn't been paid in a couple of months. He spent the money on his dune buggy. I applied for emergency help for the water, emergency food stamps, and I had to borrow money from my parents for diapers, etc.

App. 3a-4a.

During the nine months since Ms. Lewis filed for divorce, Mr. Lewis has continually harassed her, often forcing Ms. Lewis to call the police. *See* App. 6a. Mr. Lewis has broken into her house on numerous occasions, destroyed her property, made threatening phone calls, and acted irresponsibly in caring for Christopher:

> Carl had a nervous breakdown near the end of February. He had broken into my house (police report attached). Dr. John Stoker treated him with anti-depressants. He was hospitalized but I don't know for how long or where he was hospitalized. . . . I was concerned about allowing Carl to have Christopher for visitation because of the medication he was on and the alleged drug overdose of prescription pills and cutting his wrists.
>
> . . . .
>
> During that time there were more break-ins (police reports attached). On March 6, Carl had broken into the home. . . . It was his visitation weekend. He dropped Christopher off at a neighbor's house because he didn't want Christopher any more (copy of statement from neighbor is attached). I pulled in the driveway and Carl was sitting out in the street. He said, "Your precious little son is at one of the neighbors' houses."
>
> I went inside the house and called the police. Before they arrived, I wanted [sic] to three different houses to look for

> Christopher before I found him. I returned to the house and there was broken glass everywhere and the front screen was all bent and ripped. Once I got inside the house, I sat down with Christopher and waited for the police.
>
> While I was waiting, Carl returned and he was standing over me when Policeman Chris Blinkilde arrived. The officer asked me what was happening and he separated Carl and me. . . . At that point, Carl took a handful of pills out of his pocket and put them into his mouth in front of the officer. The officer handcuffed him, put him in the police car and took him downtown.
>
> . . . .
>
> Since then, the break-ins have continued and on July 1st, he refused to pay any additional child support. He didn't pay any support again until September, just before we went to court for the abortion issue.
>
> Since the Circuit Court hearing on the abortion issue, he has continuously harassed me, threatened me. I've had to leave my home because he wouldn't leave us alone. He would call at 1 o'clock in the morning, 5 o'clock in the morning. After I went to stay with my parents in Waterford, he still called long-distance to harass us.
>
> . . . .
>
> If he didn't call, he was there in the morning and at night. He would stand outside banging and screaming and yelling and pounding on the windows. The police were usually called. One weekend he did it and three police cars came.

App. 4a-6a.

Although the parties had not reconciled they engaged in sexual intercourse on one occasion, July 7, 1988, before the divorce was final. Ms. Lewis used a spermicide as a means of birth control.

On August 8, 1988, Mr. Lewis learned that Ms. Lewis was pregnant. That same day, he petitioned the court to force her to continue the pregnancy, and then give him full custody of any

child.[6] Judge Washington immediately issued a one-year injunction against any abortion, without notice to Ms. Lewis or her attorney. The court did not set a hearing at which Ms. Lewis could object to the injunction.

On August 17, Ms. Lewis requested that the injunction be dissolved. Judge Washington met in his chambers on August 19 with Mr. Steven Moss, counsel for Mr. Lewis. Ms. Linda Pylypiw, counsel for Ms. Lewis, was contacted only by telephone. Both petitioners seriously misrepresent the untranscribed telephone conference; they falsely assert that Ms. Pylypiw conceded that the medical judgment of Ms. Lewis' attending physician was that an abortion was not medically necessary to preserve Ms. Lewis' health. In fact, the trial court made no finding that Ms. Pylypiw made this concession, petitioners do not cite any evidence to support their assertion that she made this concession, and the record contains no such support. Ms. Pylypiw has enclosed in the appendix a declaration to point out these misrepresentations. *See* App. 20a.

Petitioners also rely on a statement by Dr. John Stoker which states "It is a social decision not a medical decision for a t.o.p. with this patient." *See* Lewis App. 20a. The record contains no evidence that Dr. Stoker was even Ms. Lewis' attending physician at that time. In fact, Dr. Stoker was *not* Ms. Lewis' attending physician—he had never even examined her in connection with this pregnancy. He was her physician in her first pregnancy with Christopher. Ms. Lewis has filed a complaint against Dr. Stoker with the Genesee County Osteopathic Medical Association, App. 16a, for misrepresenting his relationship with her, for violating the physician-patient privilege and for apparently signing conflicting letters—one that said an abortion was necessary to preserve Ms. Lewis' health, App. 19a, and one that says it was not, Myers App. 20a. Ms. Lewis has asked that the Medical Association order Dr. Stoker to correct what apparently was a fraud on the court.

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6 Mr. Lewis later petitioned the court to order Ms. Lewis to undergo an ultrasound. Petition For Order For Ultrasound Or Other More Accurate Determination of Length Of Pregnancy, No. 88-159036-DM (filed Sept. 2, 1988).

Despite Ms. Lewis' request for an immediate hearing, the court did not hold a hearing until September 6, one month after it enjoined Ms. Lewis from ending her pregnancy. The hearing was held in open court with the press and the public in attendance. At the hearing, Judge Washington acknowledged that the injunction cited improper statutory authority; he refused, however, to dissolve the injunction, and, in fact, issued a new preliminary injunction *nunc pro tunc* to August 9. The court did not rest its order on the "rights" asserted by Mr. Lewis, stating "I don't think that is the issue here." Myers App. 16a. Rather, the court applied the rights of minor children to a fetus. The court concluded that *Roe v. Wade* did not prohibit the enjoining of Ms. Lewis' abortion because "the United States Supreme Court was addressing the issue of the State regulation in the form of Statute and not addressing the issue as it related to a Common Law decision." Myers App. 15a. After issuing its opinion, the court appointed a guardian ad litem for the fetus for purposes of appeal; this was done sua sponte and without affording counsel an opportunity to object.

Ms. Lewis immediately appealed on September 7. The Michigan Court of Appeals granted emergency leave to appeal and on September 15 ordered that the injunction be dissolved as violative of Ms. Lewis' constitutional rights. The court, however, granted Mr. Lewis' request to stay its order until September 19. On September 15 the Michigan Supreme Court extended the stay until further order. On September 22 the Michigan Supreme Court denied the Application for Leave to Appeal filed jointly by Mr. Lewis and the guardian ad litem, but extended its stay until September 26 to allow an application for a stay to the United States Supreme Court.

Both Mr. Lewis and the guardian ad litem applied to Justice Antonin Scalia for a stay. Justice Scalia referred the matter to the full Court, which denied the application on September 26 without comment. Nos. A-240, A-244, mem. (U.S. Sept. 6, 1988) Thus, Ms. Lewis was barred by court order from exercising her right to have an abortion for a total of seven weeks, during which time she endured the severe mental strain of not knowing when, if ever, she would be "permitted" to end her unwanted pregnancy.

The day that the Michigan Court of Appeals upheld Ms. Lewis' constitutional rights, Mr. Lewis threatened to kidnap Christopher if she had terminated her pregnancy:

> On September 15, 1988, I was gone all day so I left the answering machine on. When my mother and I got home about 5 o'clock, there was a message from Carl; and, he said that if I had done what he thought I had done, he would take Christopher and I would never see him again and, "That's a promise."

App. 6a. Two days after the stay was dissolved, a warrant was issued for the arrest of Mr. Lewis on the charges of unlawful entry. On that date, Mr. Lewis kicked down the steel door to Ms. Lewis' house, which she had dead-bolted, and entered her home accusing Ms. Lewis of "killing his baby." *See* App. 14a. A friend managed to keep Mr. Lewis from approaching Ms. Lewis, who managed to call the police. Mr. Lewis' attorney, Steven Moss, was quoted as saying of the incident "I don't know what I would do if that was me. I might beat the hell out of her." *Id.*

As part of the Judgment of Divorce, issued October 24, 1988, the court issued a permanent injunction, to remain in effect until April 9, 2005, ordering Mr. Lewis to desist and refrain from "assaulting, beating, molesting or wounding" Ms. Lewis or entering onto her premises. Mr. Lewis was granted the right to only supervised visitation with his son Christopher.

REASONS WHY THE PETITIONS SHOULD BE DENIED

The Petitions should be denied because they fail to establish any of the factors that weigh in favor of review on a writ of certiorari: This Court's prior decisions are dispositive, the Michigan Court of Appeals properly applied those decisions, and no conflict exists among state or federal appellate courts as to the proper disposition of petitioners' claims. *See* Sup. Ct. R. 17. In attempting to argue to the contrary, petitioners misrepresent the facts of this case and grossly distort this Court's decisions upholding reproductive freedom and the right to privacy. As

every appellate court has recognized, *Roe v. Wade* and its progeny clearly protect the right of every adult woman, including respondent, to choose to terminate her pregnancy prior to viability.

I. THIS COURT'S PRIOR DECISIONS UPHOLDING WOMEN'S REPRODUCTIVE FREEDOM ARE DISPOSITIVE AND WERE PROPERLY APPLIED BY THE MICHIGAN COURT OF APPEALS.

A. A Woman's Constitutional Right To Decide Whether To Terminate Her Pregnancy Is Not Contingent Upon A Showing That The Abortion Is Medically Necessary

The Michigan Court of Appeals properly dissolved the trial court's injunction, finding that "the injunction interferes with plaintiff's constitutional rights as set forth by the United States Supreme court in *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*." App. 3a (citations omitted).

Petitioners seek review of the Michigan Court of Appeals' decision on the entirely frivolous ground that "the [privacy] right extends only to abortions which are medically necessary for the well-being of the mother in the sound medical judgment of the attending physician."[7] Myers Pet. at 10; *see also* Lewis Pet. at 10. This distortion of the liberty-based privacy right is directly contradicted by this Court's decisions.

In *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court held that a woman has a constitutional right to decide whether to have an abortion: The "right of privacy . . . founded in the Fourteenth Amendment's concept of personal

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7 Petitioners are not clear about how they would define medical necessity. This Court has construed the concept of necessity very broadly in *Doe v. Bolton*, 410 U.S. 179, 192 (1973), as including "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." The note from Dr. Stoker relied on by petitioners, however, did not purport to consider all of these factors. In any event, petitioners' interpretation would allow the opinion of a single physician to defeat a woman's right to choose abortion and apparently would impose on a woman "an initial evidentiary burden" to establish that an abortion was medically necessary. Myers Pet. 18. This interpretation in clearly incorrect.

liberty and restrictions upon state action . . . is broad enough to encompass a *woman's* decision whether or not to terminate her pregnancy." *Id.* at 153 (emphasis added). Since *Roe* the Court has consistently and unequivocally reaffirmed the right in numerous decisions. *See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976). Thus, as the Michigan Court of Appeals found, this Court's decisions in *Roe* and its progeny are dispositive.

Even a cursory reading of *Roe* makes absolutely clear the absurdity of petitioners' claim that a woman has no right to choose to have an abortion unless she demonstrates that an abortion is necessary to preserve some narrow definition of her health. In *Roe* this Court catalogued some of the severe physical, emotional and life-altering harms that the state would inflict on a woman by forcing her to bear an unwanted child:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

410 U.S. at 153. Justice Douglas in his concurrence elaborated on the ways in which an involuntary pregnancy and childbirth would require a woman "to endure the discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forego the satisfactions of careers; to tax further mental and physical health in providing child care." *Id.* at 214-15. Depriving a woman of her right to control her body would rob her of her ability to shape her own life and pursue her chosen goals and dreams. In addition to these considerations which

may go beyond ones considered purely "medical," the Court in *Roe* implicitly recognized that there would always be a sufficient medical indication for abortion in the first trimester: that it is always safer than continued childbirth and pregnancy.[8]

Petitioners misleadingly string together quotations taken out of context from this Court's decisions that refer to a woman's "attending physician" and the physician's "medical judgment." Petitioners argue that because the Court has acknowledged that "medical judgment" is involved in the abortion decision, only some undefined but narrow class of medically necessary abortions is protected. This reasoning is absurd. Certainly, an abortion is a medical procedure requiring "medical judgment," as does any medical treatment. Thus, the Court's references are not surprising. This in no way means, however, that a woman's right to choose to have an abortion is contingent on a physician's determination that continuing a pregnancy would endanger the woman's health. Rather, the Court's references to the physicians' involvement is aimed at ensuring that a woman's decision to terminate her pregnancy is effectuated by "medically competent personnel." *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975).

If petitioners were correct, a single physician who is personally opposed to all abortions would have the power to deny a woman her right to choose to have an abortion by stating it was not medically necessary. This indefensible interpretation is in direct conflict with this Court's statement that the role of a physician in a woman's abortion decision, as in any medical decision, is to use his or her medical training to assist the woman in making an informed choice:

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8 Abortion, particularly early abortion, is safer than continued pregnancy and child birth. In terms of mortality, "abortion through the 15th week of pregnancy is at least tenfold safer than childbearing." Cates, Smith, Rochat & Grimes, *Mortality From Abortion and Childbirth, Are the Statistics Biased*, 248 J. A.M.A. 192, 196 (1982). "Moreover, the risk of death from legal induced abortion is no higher at any point in gestation than is the risk of death from childbearing." Tietze & Henshaw, *Induced Abortion: A World Review* 110 (1986) (The Alan Guttmacher Institute). Finally, "[e]xamination of the data on which mortality rates for legally induced abortion and childbearing are calculated indicates the comparisons overestimate the abortion risks." Cates, *supra*, at 196.

> The Court also has recognized, because abortion is a medical procedure, that the full vindication of *the woman's fundamental right* necessarily requires that her physician be given "the room he needs to make his best medical judgment." *Doe v. Bolton*, *Roe*, 410 U.S. 179 (1973). See *Whalen v. Roe*, 429 U.S. 589 (1977). The physician's exercise of this medical judgment encompasses both assisting the woman in the decisionmaking process and implementing *her* decision should *she* choose abortion.

City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 427 (1983) (emphasis added).[9]

Finding that "the rights of the pregnant woman" to make the abortion decision are fundamental, the Court held that a state may interfere with that decision only to the extent necessary to further "compelling" interests asserted by the state. *Roe*, 410 U.S. at 162-63. Contrary to petitioners' complete distortion of *Roe*, the Court further held that the state may require a showing of medical necessity *only* if the state has a compelling interest supporting that restriction; this occurs at viability when the state's interest in the potentiality of the fetus becomes compelling. *Id.* at 163-64 (after viability, state may "go so far as to proscribe abortion . . . except when it is necessary to preserve the life or health of the mother").

Petitioners have not even attempted to argue (nor could they) that there existed a compelling state interest sufficient to justify depriving Ms. Lewis of her constitutional right to choose to have an abortion. Thus, petitioners' requests for a writ of certiorari must be rejected.

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9 Similarly, as this Court stated:

> Nothing in [*Doe v. Bolton*, 410 U.S. 179 (1973)] suggests that a doctor's right to administer medical care has any greater strength than his patient's right to receive such care. The constitutional right vindicated in *Doe* was the right of a *pregnant woman* to decide whether or not to bear a child without unwarranted state interference. The statutory restrictions on the abortion procedures were invalid because they encumbered the woman's exercise of that constitutionally protected right by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision.

Whalen v. Roe, 429 U.S. 589, 604 n. 33 (1977) (emphasis added).

II. PETITIONERS' "QUESTIONS PRESENTED" ARE NOT PROPERLY RAISED BY THE FACTS OF THIS CASE BECAUSE NO DETERMINATION WAS MADE BY MS. LEWIS' ATTENDING PHYSICIAN THAT AN ABORTION WAS NOT MEDICALLY NECESSARY

Petitioners contend that this case presents the question whether the right to privacy protects the decision to have an abortion where the woman's attending physician has determined that the abortion is not necessary for the woman's well-being. That question is not presented by this case. Petitioners rely on what they describe as a "concession" by counsel for Ms. Lewis and a one-sentence note apparently written by Dr. John Stoker which states "It is a social decision not a medical decision for a t.o.p. with this patient." Myers App. 20a. Petitioner Myers admitted that "[t]his concession by counsel for [Ms. Lewis] is the hinge on which this case turns." Myers App. 18a. However, Ms. Linda Pylypiw, trial counsel for Ms. Lewis, never conceded that an abortion was not medically necessary, and Dr. Stoker was not Ms. Lewis' attending physician in connection with this pregnancy. App. 21a. The record contains no support for petitioners' assertions to the contrary, the trial court made no such findings, and any such findings would be clearly erroneous.

Dr. Stoker was Ms. Lewis' physician in her first pregnancy. Dr. Stoker never physically examined her in connection with this second pregnancy. Despite his lack of information upon which to make a medical determination, Dr. Stoker apparently wrote two conflicting statements about medical indications for Ms. Lewis' abortion. In addition to the note to Mr. Lewis, Dr. Stoker wrote a second contradictory note stating that an abortion was medically necessary to preserve Ms. Lewis' health. "Shawn Lewis had a difficult time with her first pregnancy on the date of 04/09/87 and she cannot handle the stress at this time." App. 19a.

It has not yet been determined why Dr. Stoker wrote these conflicting notes without a proper medical evaluation or examination and why he released confidential information without Ms. Lewis' consent. The Genesee County Osteopathic Medical

Association is currently considering a complaint filed by Ms. Lewis against Dr. Stoker for his unprofessional, unethical and possibly illegal behavior in this matter. Ms. Lewis is requesting that Dr. Stoker be ordered to retract his statements and correct his misrepresentations to the state courts and to this Court.

III. AS THIS COURT'S DECISIONS MAKE CLEAR, THE DECISION OF THE MICHIGAN COURT OF APPEALS DOES NOT CONFLICT WITH ANY COMPELLING INTEREST ASSERTED BY THE STATE OF MICHIGAN OR ANY FEDERAL RIGHT ASSERTED BY PETITIONERS.

Petitioners' failure to assert a compelling state interest is fatal because a compelling interest is essential to justify any state interference with Ms. Lewis' abortion decision. Petitioners make only the legally insufficient claim that the state and Mr. Lewis have legitimate interests that weigh against Ms. Lewis' having an abortion. Even this extremely limited claim proves false: No Michigan statute purports to protect the interests petitioners assert; the state of Michigan has taken no part in this case; and petitioners possess no federal rights that are implicated by Ms. Lewis' decision to have an abortion. Even if petitioners had asserted legitimate interests, those interests could not defeat Ms. Lewis' constitutional rights. Moreover, if petitioners had applied the correct legal standard, they could not have established the existence of a compelling state interest to justify forcing Ms. Lewis to continue her pregnancy and to give birth against her will.

A. A Man Does Not Have A Constitutional Right To Interfere With A Woman's Decision To Have An Abortion.

In 1976 this Court decided the precise issue presented here; the Court unequivocally declared that a woman's right to end an unwanted pregnancy may not be infringed on the basis of her husband's objections. *See Danforth*, 428 U.S. at 69-71. The Court struck down a Missouri law that prohibited a married

woman from having an abortion without her husband's consent. *Id.*

Mr. Lewis argues that *Danforth* is not dispositive because it involved a state statute giving all men the right to veto their wives' abortion decisions, whereas Mr. Lewis "seeks a judicial consideration of competing rights and interests, based on the facts of each case." Lewis Pet. 8. This suggested distinction is insignificant. As the Court recognized in *Danforth*, "The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail." *Id.* at 71. Mr. Lewis quite definitely seeks the creation of a right that would allow a man to use the courts to veto a woman's decision to have an abortion. Whether imposed by court order on a case-by-case basis or by state statute, the deprivation of a woman's constitutional right is equally complete and the harm resulting from a court-ordered pregnancy and childbirth equally devastating.

Moreover, this Court has already done the balancing of interests sought by Mr. Lewis. The Court in *Danforth* expressly considered "the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying." *Id.* at 69. Nevertheless, the Court concluded that a woman's right to make the abortion decision outweighs her husband's interests in each and every case: "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, *the balance weighs in her favor.*" *Id.* at 71 (emphasis added).

Roe and its progeny make clear that a case-by-case judicial inquiry into a woman's abortion decision would itself be unconstitutional. *Cf. Thornburgh*, 476 U.S. at 766 (quoting *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring)) ("It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties."); *Doe v. Bolton*, 410 U.S. at 195-98 (abortion decision may not be subject to *ad hoc* determinations of hospital committee). An individual woman's personal circumstances are legally irrelevant. Recognizing the unparalleled importance of a

woman's right to control her reproductive capabilities, the Court has declared that every adult woman has the right to decide to have an abortion and to effectuate that decision without government interference, regardless of her very personal reasons and without having to reveal those reasons.[10]

1. The Fourteenth Amendment Affords Individuals Protection Only From State Action And Does Not Apply to Wholly Private Acts Such As A Woman's Choosing An Abortion.

Even absent *Danforth* and the Court's other dispositive abortion cases Mr. Lewis could not prevail. His assertion that Ms. Lewis' abortion decision implicates his constitutional rights is frivolous. The federal constitutional rights cited by Mr.

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10 Faced with having to explain to a court their reasons for choosing abortion and having to expose intimate details of their lives to judicial and public scrutiny, some women would instead resort to unsafe, illegal abortions, despite the great risks to their health and lives. Although a private abortion is a legal and constitutionally protected choice, some women nevertheless have illegal abortions. A study of the seventeen deaths following illegal abortions reported in the United States between 1975 and 1979 revealed that "[a] desire for secrecy was the primary reason four women sought illegal abortions and was a secondary factor for five others." Binkin, Gold & Cates, *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Family Planning Perspectives 163, 165 (May/June 1982). Given that nine of seventeen women lost their lives due to a desire to keep their abortions secret during a time when their privacy was protected, that number inevitably would be far greater if Mr. Lewis' "case-by-case" review were lawful.

Moreover, the purely voluntary role that men play in women's abortion decisions would likely be hurt under Mr. Lewis' approach. The vast majority of women who have abortions inform the man involved. Plutzer & Ryan, *Notifying Husbands About An Abortion: An Empirical Look at Constitutional and Policy Dilemmas*, 71 Sociology and Social Research 183 (Apr. 1987). A study of 2,337 women seeking abortions at a clinic in St. Louis, Missouri revealed that 89.5% of the women had told the man involved about the pregnancy, and 92.8% of the married women had told their husbands. *Id.* at 185. If a man had the right to seek a court order prohibiting a woman from obtaining an abortion, a woman considering abortion would be discouraged from telling the man involved. The result could be that far fewer men would have any opportunity at all to be involved in women's abortion decisions.

Lewis—the right to procreate, rights derived from a marital relationship, and the right to raise one's children—protect a person only from *governmental* action and not the wholly private acts of individuals.[11] *Every* case cited by Mr. Lewis as support for his constitutional claims involves government action affirmatively interfering with the autonomy of private individuals.[12] This is not such a case.

For example, the Constitution certainly protects Mr. Lewis' right to be free from government intrusion in his decision to have a child. But it is up to Mr. Lewis, not lower court judges, to find a woman who will have a child with him. No individual, male or female, has a constitutional right to have a court compel another to procreate with him or her. To the contrary, the Constitution guarantees that the government will not interfere with the reproductive choices made by any individual.

Justice Stevens noted this fundamental flaw in Mr. Lewis' claim when he denied an application for an injunction in a legally and factually similar case, *John Doe v. Jane Smith*, 108 S. Ct. 2136 (1988). Justice Stevens wrote "I have serious doubts concerning the availability of a federal remedy for this claim in view of the fact that Jane Smith's decision to obtain an abortion can be carried out without any action on the part of the

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11 "The first section of the 14th Amendment . . . is prohibitory in its character, and prohibitory upon the States. . . . It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment." *Civil Rights Cases*, 109 U.S. 3, 9-12 (1883); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982).

12 *See Rivera v. Minnich*, 107 S. Ct. 3001 (1987) (*state* may use preponderance of evidence standard in paternity proceeding); *Santosky v. Kramer*, 455 U.S. 745 (1982) (*state* may not sever parental rights absent clear and convincing evidence of grounds for termination); *Caban v. Mohammed*, 441 U.S. 380 (1979) (*state* may not practice sex discrimination in adoption proceedings); *Stanley v. Illinois*, 405 U.S. 645 (1972) (*state* may not sever parental rights based on father's unmarried status); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (*state* may not prohibit sale of contraceptives to married individuals); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (*state* may restrict public sale of merchandise by minors, including sale of religious publications); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (*state* may not sterilize persons convicted of crimes).

State of Indiana or any other state governmental subdivision." *Id.* at 2137.

The constitutional rights asserted by Mr. Lewis act only as "a shield for the private citizen against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens." *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128, 132 (1974). The court in *Doe* rejected a request by a man to enjoin his wife's abortion, concluding "[w]e find no basis for the husband's assertion that the Constitution enables him to summon the Commonwealth to help him in a dispute with his wife." *Id.* Mr. Lewis improperly seeks to twist constitutional shields designed to protect individuals from government intrusion, into swords of government coercion in the form of judicial action to subordinate women to the wills of their husbands.

a. Right To Procreate

The implications of Mr. Lewis' distortion of the right to procreate are staggering: In effect he claims that the right to procreate entitles a man to invoke the power of the government to compel a woman to bear his child. If he is correct, courts could order unwilling individuals to engage in uncontracepted sex with spouses or lovers desirous of having children. Or, an individual whose sexual partner did not wish to have a child could be compelled to use contraception during sex. The Supreme Judicial Court of Massachusetts outlined the insidious implications of judicial intervention in refusing to issue an injunction similar to the one requested by Mr. Lewis:

> [W]e would not order either a husband or a wife to do what is necessary to conceive a child or to prevent contraception, any more than we would order either party to do what is necessary to make the other happy. We think the same considerations prevent us from forbidding the wife to do what is necessary to bring about or prevent birth . . . . Some things must be left to private agreement.

Doe v. Doe, 365 Mass. 556, 314 N.E.2d 128, 132 (1974).

Given the constitutional right not to procreate, a man who did not want a child would even have the right to seek a court order forcing a woman to submit to an unwanted abortion:

> If we were to conclude that a putative father has the standing to *prevent* the natural mother from terminating the pregnancy would the putative father have the corresponding standing to *compel* the termination of the pregnancy . . . ? Could a potential putative father (or for that matter a husband) seek an injunction to restrain the woman from using contraceptives or compel the woman to bear children? Such circumstances would seem ludicrous . . . and it would be beyond the province of logic and reason to suggest that she could be compelled to procreate.

Jones v. Smith, 278 So.2d 339, 344 (Fla. App. 1973) (emphasis in original) (court refused to enjoin woman from having abortion opposed by man claiming responsibility for pregnancy, despite man's expressed desire to marry woman and assume responsibility for child), *cert. denied*, 415 U.S. 958 (1974). If Mr. Lewis' flawed analysis were accepted the federal courts would be faced with the impossible task of resolving countless disputes involving abortion, sterilization, and the use of birth control, between spouses and lovers unable to agree about whether to have a child.

b. Rights Derived From Marriage

Mr. Lewis asserts that "his status as a husband in the family unit" confers upon him a "marital right of privacy." Lewis Pet. 13. Mr. Lewis seems to be arguing that the privacy right inheres in the marital couple, rather than in the husband and wife as individuals. This view was rejected in *Danforth* and also runs counter to the basic principle that the privacy right protects individuals only from *government* action. Moreover, in *Eisenstadt v. Baird*, the Court expressly rejected the notion that the marital couple is a separate independent entity, and instead recognized marriage as "an association of two individuals each with separate intellectual and emotional makeup." 405 U.S. 438, 453 (1972) (unmarried individuals have constitutional right

to use contraceptives); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977) ("*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.").

Mr. Lewis' assertion of rights "inherent in his status as a husband," Pet. 13, amount to a claim that a man has the right to use the power of the state to subjugate his wife's will to his own. This outdated view of the marital relationship is inconsistent with this Court's condemnation of our country's "long and unfortunate history of sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982). Since 1973, the Supreme Court has recognized that unimpeded access to safe legal abortion services is essential to women's capacity to live as free, equal and autonomous citizens. *See Roe*, 410 U.S. 113. Most recently, the Court reiterated this principle in *Thornburgh*:

> Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond reach of government . . . *That promise extends to women as well as to men.* Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty *that our law guarantees equally to all.*

476 U.S. at 772 (citations omitted; emphasis added). Stripping women of control of their reproductive capacity, and giving that control to their husbands, would condemn women to a continued existence as unequal and subordinate members of our society.

c. The Right To Raise One's Children

Mr. Lewis' reliance on the constitutional right of fathers to "the care, custody, control, and companionship of his children," Pet. 12, is entirely irrelevant to Ms. Lewis' decision to have an abortion. Certainly, fathers as well as mothers have constitutional rights (again, assertable only against government action) vis-a-vis their children. Yet those rights are not in any way implicated here because this case involves neither a child nor a father. Rather, the issue here is whether a man can force a woman to bear a child and become a mother against her wishes in order to satisfy his desire to have a child.

Mr. Lewis' alleged "paternal rights" are based on a theory that human life begins at conception, so that a fetus is a "child" and a man who has fertilized a woman's ovum is a "father." Yet the Court in *Roe* rejected precisely this effort to enshrine a particular theory of life as state law. *See Roe v. Wade*, 410 U.S. at 159-62; *see also Akron*, 462 U.S. at 444 ("a State may not adopt one theory of when life begins to justify its regulation of abortions"). The state of Michigan has not adopted as law Mr. Lewis' theory of when life begins, but even if it had, such a law would plainly be unconstitutional and thus unavailable to Mr. Lewis to support his claims.

B. The State of Michigan Has Not Asserted A Compelling Interest In Fetal Life In Order To Deprive Women Of Their Right To Choose Abortion.

The trial court treated this case as a controversy about the rights of a child whose parents are involved in a divorce proceeding, and found its legal authority for issuing the injunction prohibiting Ms. Lewis from terminating her pregnancy in the Child Custody Act of 1970 and the state divorce statute provisions for the care, custody, and support of minor children.[13] Declaring that "there is a wide open view as to what constitutes

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13 The court also relied on Michigan Rules of Court, Rule 3.204(a)(4) requiring that a complaint for divorce contain information "that the female party is pregnant, if she is." Myers App. 10a. The trial court erroneously

a child," the court made a radical departure from judicial precedent, and defined the term to include all fetuses.[14] Myers App. 16a. The court, blatantly disregarding this Court's precedent, then granted the fetus an absolute right to be born, holding, in effect, that by participating in a divorce proceeding, a woman waives her constitutional right to terminate her pregnancy.

The only precedent the court cited for this proposition, *Tyler v. Tyler*, 348 Mich. 169, 82 N.W.2d 448 (1957), held that a court could re-open a divorce decree to provide for the maintenance and support of a child conceived during marriage, but not yet born at the time of the divorce. *Id.* at 172. The court was protecting a property interest that was contingent upon the birth of a child, an interest that is entirely consistent with upholding a woman's right to choose abortion.[15] When the court issued the injunction prohibiting Ms. Lewis from terminating her pregnancy, it was not exercising its jurisdiction over a minor child, nor was it protecting the property rights of a future child; it was seeking to force a pregnant woman to bear a child against her will.

Mr. Myers, in his petition for certiorari, completely abandons the trial court's analysis and supplies an alternative, though equally flawed, legal theory. He argues that the trial court's injunction is supported by two state interests: (1) the

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assumed that this requirement anticipates the court's intervention in the woman's pregnancy. Myers App. 16a-17a. In fact, such information is relevant to a divorce proceeding only because it is the duty of the court to ensure that a child born subsequent to the dissolution is provided for in terms of support, maintenance, and custody.

14 Nowhere in the definition section of the Child Custody Act of 1970, Mich. Comp. Laws Ann. § 722.22(2)(a) (West Supp. 1988) is a fetus included in the definition of a minor child. In fact, the very nature of the factors that a court must consider under the Child Custody Act, when applied to a fetus, demonstrate that a fetus was not within the contemplation of the drafters of the legislation. *Id.* § 722.23. Moreover, a court is precluded from defining all fetuses, and particularly those in the first trimester of development, as children.

15 The property right was contingent upon live birth, for if the child were not born alive, no right to support would accrue. *See Toth v. Goree*, 65 Mich. App. 296, 237 N.W.2d 297, 305 (1975) (Maher, J., dissenting).

state of Michigan's interest in protecting fetal life; and (2) Michigan's public policy of encouraging childbirth over abortion.

Mr. Myers' arguments must fail because, as this Court has held, whatever interest the state of Michigan has recognized in fetal life, this interest does not justify interfering with a woman's right to life and liberty, including her fundamental right to terminate a pregnancy prior to viability. In *Roe v. Wade* this Court stated quite clearly that "we do not agree that, by adopting one theory of life, [a state] may override the rights of the pregnant woman that are at stake." 410 U.S. at 162.

In addition, the state of Michigan has not asserted any interest in the fetus that is implicated by this case. No Michigan statute seeks to prohibit first trimester abortions and the state has taken no part in this case. Yet Mr. Myers argues that Michigan has asserted an interest in protecting fetal life at the expense of the rights of a woman who chooses to have an abortion. Mr. Myers relies on a case that held the estate of an eight-month-old viable fetus was eligible to recover under the state's wrongful death statute. *O'Neil v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971). This reliance on *O'Neil* is both misleading and duplicitous. Permitting recovery for the wrongful death of a fetus does not conflict with the rights of the pregnant woman; rather, it protects the woman's interests by compensating her for the loss of her expected child.[16] Moreover, Ms. Lewis was in her first trimester of pregnancy and the Michigan Supreme Court has unequivocally held that a nonviable fetus is not a "person" within the wrongful death act. *Toth v. Goree*, 65 Mich. App. 296, 237 N.W.2d 297, 302 (1975). Mr. Myers cites this case in his petition but does not disclose its holding. Myers Pet. at 23, n.12.

Mr. Myers also inaccurately claims that Michigan has adopted a public policy of preferring childbirth over abortion

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16 This Court addressed the subject of fetal status under wrongful death statutes in *Roe*: "In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life." 410 U.S. at 162 (footnote omitted).

through the recent passage of a statutory amendment proscribing the use of public funds to finance abortions.[17] Even if this were true, it would in no way imply that the state had expressed an interest in ensuring that fetuses are born at the expense of a woman's constitutional right to choose abortion. In fact, this Court expressly held that declining to fund abortion is entirely distinct from prohibiting abortion. *See Harris v. McRae*, 448 U.S. 297, 316 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

The state has a compelling interest in preserving and protecting the lives and health of pregnant women and protecting the constitutional rights of its citizens. *See Roe*, 410 U.S. at 162. There is no reason to assume that a state would seek to promote fetal interests where the very rights to life and liberty, including the right to terminate an unwanted pregnancy, were threatened.

IV. THE MICHIGAN COURT OF APPEALS DECISION IS CONSISTENT WITH THE DECISIONS OF EVERY APPELLATE COURT TO CONSIDER THE ISSUE

Mr. Lewis alludes to the fact that since 1973 there have been "well over two hundred and fifty abortion cases in lower federal courts." Lewis Pet. 17. Yet neither petitioner cites a single case by any court, federal or state, appellate or trial, to support their frivolous argument that this Court's decisions hold that only certain, undefined abortions are constitutionally protected. To respondent's knowledge, no court has ever adopted this distorted interpretation of *Roe* and its progeny. To the contrary, courts have uniformly recognized the right of every adult woman to decide to have an abortion.

Moreover, every appellate court to consider the issue has held that a man does not have the right to a court order enjoining a woman from exercising her abortion right. This has been true in cases both where the man seeking the court order was the

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17 Michigan has provided, and is currently providing, public funds for abortion. In 1987 the state legislature approved a bill banning Medicaid-paid elective abortions. However, the law was almost immediately suspended by the filing of petitions demanding a voter referendum. Letter from Attorney General Frank Kelly to Social Services Director C. Patrick Babcock (Mar. 28, 1988). Voters will decide whether the new law will go into effect during the general election in November, 1988.

woman's husband, *Conn v. Conn*, 526 N.E.2d 958 (Ind. 1988), *applications for stay denied*, No. A-88-55 (U.S. July 22, 1988) (letter from the Clerk of the Court), *petition for cert. filed*, 57 U.S.L.W. 3186 (U.S. Sept. 23, 1988) (No. 88-347); *Coleman v. Coleman*, 57 Md. App. 755, 471 A.2d 1115 (1984); *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128 (1974), as well as where the man was not the woman's husband but claimed to be responsible for the woman's pregnancy, *John Doe v. Jane Smith*, 527 N.E.2d 177 (Ind. 1988), *applications for stay denied*, 108 S. Ct. 2136 (1988) (Stevens, J., in chambers), No. A-88-55 (U.S. July 22, 1988) (White, J.) (letter from Clerk of the Court); *Jane Doe v. John Smith*, No. 84A01-8804-CV-00112, slip op. (Ind. Ct. App. Oct. 24, 1988); *Jones v. Smith*, 278 So.2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974). *See also Przybyla v. Przybyla*, 87 Wis.2d 441, 275 N.W.2d 112 (Wis. Ct. App. 1978) (woman's exercise of right to terminate her pregnancy without consent of husband cannot support recovery by husband for intentional infliction of emotional distress). Courts consistently denied such requests even prior to *Danforth*:

> "[*Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973)] make crystalline . . . that a woman in the first trimester of pregnancy, in consultation with her physician, may elect to terminate the pregnancy, and neither the state nor the woman's spouse nor the father of the child has any right to intervene so as to prevent her decision from becoming fact."

Coleman, 471 A.2d at 1119; *see also Doe*, 314 N.E.2d 128; *Jones*, 278 So. 2d 339.

V. NO REASON EXISTS FOR THIS COURT TO TAKE THE EXTRAORDINARY STEP OF RECONSIDERING ITS WELL-ESTABLISHED AND UNBROKEN PRECEDENT RECOGNIZING A WOMAN'S RIGHT TO END AN UNWANTED PREGNANCY.

Petitioners' arguments are so wholly without merit that petitioners are left to argue that this Court should reconsider its decision in *Roe v. Wade*, 410 U.S. 113. This request, which

would be extraordinary in any case, is ludicrous here because petitioners would not prevail even if a woman's right to choose abortion were not constitutionally protected. As explained above, the state of Michigan has not asserted any interest in stopping Ms. Lewis from obtaining an abortion, nor have petitioners established any state action interfering with any rights of Mr. Lewis.

There is no valid reason to ignore the principle of *stare decisis* by reconsidering *Roe*. Petitioners' arguments require overruling, not merely "reconsidering," *Roe* as well as fifteen years of Supreme Court precedent reaffirming a woman's constitutional right to choose abortion. Overruling *Roe* and its progeny would also cast serious doubt on a long series of landmark Supreme Court rulings recognizing the right to privacy that spans back at least to 1923. As the Court made clear, *Roe* was a natural outgrowth of a gradual process of evolution involving the recognition of our basic liberties including the liberty to decide for ourselves when and whether to marry, *see Loving v. Virginia*, 388 U.S. 1 (1967), how to raise and educate our children, *see Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and how much of our most personal lives to disclose to the world, *see Katz v. United States*, 389 U.S. 347 (1967), as well as the right to decide whether to conceive or bear children, *see Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965).[18]

In support of their request, petitioners offer a variety of arguments, all founded on the premise that we know more now about abortion than we did in 1973 and that the purported "advances" in legal scholarship, scientific knowledge, and understanding of the social implications of abortion since then justify rejecting *Roe*.

The petitioners' premise is false. Henry Wade, District Attorney of Dallas County in 1973, argued extensively in his brief in *Roe* that "modern science—embryology, fetology, genetics,

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18 The Court noted in *Roe*, 410 U.S. at 152, that it had recognized the right to privacy as far back as 1891. *See Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891). The Court wrote in *Botsford* that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person."

perinatology, all of biology—establishes the humanity of the unborn child." Brief for Appellee at 31, *Roe*, 410 U.S. 113. The brief cited literally dozens of scientific articles and included photographs of fetuses at forty days, six weeks, nine weeks, ten weeks, twelve weeks, sixteen weeks, seventeen weeks, and eighteen weeks. *Id.* at 35-51.[19] In addition, Wade cited extensive caselaw in support of his claim that the fetus should be treated as a "person" under the law. This Court carefully considered and deliberately rejected these arguments. *Roe*, 410 U.S. at 156-162.

Moreover, petitioners could not argue, indeed do not argue, that we know more now than in 1986, when the Court upheld the right to choose abortion in *Thornburgh*, 476 U.S. 747, or in 1983 when it decided *Akron*, 462 U.S. 416. The same arguments were made and rejected by the Court in these cases. In *Akron*, the Court enumerated the "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*:"

> That case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term. The decision was joined by The Chief Justice and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy. *See Connecticut v. Menillo*, 423 U.S. 9 (1975); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Bellotti*

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19 *See also Drama of Life Before Birth*, Life Magazine, Apr. 30, 1965 (showing color photographs, eight years before *Roe*, of fetuses in utero); K. Luker, *Abortion & the Politics of Motherhood* 23-27 (1984) (discussing widespread knowledge of fetal development in the Nineteenth Century and stating that early "[p]opular (and legal) acceptance of abortion was not based on ignorance of 'the facts,' as physicians asserted, but on *a different moral evaluation of the facts*.") (emphasis in original).

v. Baird, 443 U.S. 622 (1979); *Harris v. McRae*, 448 U.S. 297 (1980); *H.L. v. Matheson*, 450 U.S. 398 (1981).

462 U.S. at 420 n.1. The petitioners in this case offer no new information and no original rationale for reversing this Court's long-established precedents.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

November 2, 1988

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

CASE NO. 88-158036-DM

JUDGE VALDEMAR WASHINGTON

SHAWN KATHLEEN LEWIS,

Plaintiff

—v.—

CARLTON JAMES LEWIS,

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STEVEN W. MOSS P40411
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404 N. Linden Road
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Guardian ad Litem
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191 Harding Ave., P.O. Box 410
Terre Haute, Indiana 47808
812-238-2421

AFFIDAVIT

STATE OF MICHIGAN)
COUNTY OF GENESEE) ss.

NOW COMES Plaintiff-Appellant, SHAWN KATHLEEN LEWIS, and after being duly sworn deposes and says:

I believe I first met my husband in February of 1985. I met him through some friends of ours. A group of about 17 of us all went camping together in northern Michigan in May 1985. We didn't start dating until October 1985.

In December of 1985, he moved into my home; and, we got engaged in February 1986. We were married in July 1986 and we had been married two weeks when I found out that I was three weeks pregnant. From that day on, I was continually ill. I had high blood pressure, high blood sugar, kidney infection (for which they hospitalized me for a week). I was restricted to my bed for three months before I had Christopher, who was born on April 9, 1987. I was unable to take care of my husband or my house; and, my mother had to come in to clean and cook for us.

Carl left three times during the pregnancy for about two weeks each time. Just before Christmas 1986 he left. He said that he couldn't handle it that I couldn't go anywhere or do anything and that I was constantly ill. He went and lived with

his brother; and, at that time, he stated that he did not want the child that I was carrying. I went to his brother's house and begged him to come back.

He left again the end of January or beginning of February 1987. We were fighting because he wanted to go to his cousin's home, someone I didn't approve of because he is a heavy drinker and Carl was influenced by this cousin. I wanted him to stay with me; but, he told me to get out of the car and dropped me off by the overpass at Court Street and Dort Highway. I walked home in the snow, 7 months pregnant, in cowboy boots and a light jacket. I got about three blocks from home after I had walked almost two miles when he sent a friend, Joe Stevens, to pick me up. When I got home, Carl had taken all of his things and moved to his brother's.

I don't remember the specifics of when he left the third time during my pregnance [sic]; however, when Christopher was born in April, when he was 5 weeks old—about May 24th, which is around the time he beat me up (a copy of the police report is attached), he left again. At that time, I was undergoing heart testing because my father had just had open heart surgery for a diseased valve which was hereditary. In addition, I had an infection in my tubes from the pregnancy.

When he left that time, both Carl and his mother threatened to take Christopher away from me. I was in the phone booth at the hospital talking to Carl on the phone when his mother got on the phone and said they were going to get a lawyer to take the baby away from me. I was at the hospital visiting my father.

At that time we had been fighting a lot because I didn't want to let his mother take care of Christopher. Each time I let her take him, she wouldn't feed him every three hours as directed and he returned with diaper rash because of her not changing his messy diapers. Each time I let her take care of Christopher, he was a mess by the time I got back. Carl and I fought because I wanted my mother to watch Christopher but didn't want his mother to.

When Carl left that time, he went to his mother's for at least two weeks. Each time he was gone, he was gone about two weeks—long enough to get a full paycheck and spend it on himself. Then he would come back.

After he came back home, he didn't have a lot of patience with the baby. He never bathed the baby. Once in a while, he'd change a diaper. More or less, Christopher got in the way because we couldn't do things like we had been able to do before Christopher was born. He worked second shift and would want to go out after he got home from work. I couldn't go out because I would have to be up at 6 o'clock in the morning and take care of the baby. We fought a lot about that.

I never left Carl alone with Christopher very often because he would run out of patience and yell. One time when I let [sic] him with Christopher, he let Christopher fall off the couch and badly scratched his head.

Things were better until he left again November 1, 1987. He took our son trick-or-treating the night before and I thought everything was okay. He left and went to his mother's house. The next day he called my parents and told them that he no longer could handle it, that he didn't want the responsibility of Christopher and me, and to find someone else to take care of us. On November 2nd, I went down and filed for ADC.

At that time, the heat bill was at least 2 months behind, the water was to be turned off, and the phone had been turned [sic] because the bills hadn't been paid in a couple of months. He spent the money on his dune buggy. I applied for emergency help for the water, emergency food stamps, and I had to borrow money from my parents for diapers, etc.

In January, the day I filed for divorce and custody of Christopher, the reason I called Mr. Swirtz was because Carl had called and threatened to take Christopher and move down south so I would never see Christopher again.

Carl had a nervous breakdown near the end of February. He had broken into my house (police report attached). Dr. John Stoker treated him with anti-depressants. He was hospitalized but I don't know for how long or where he was hospitalized. I talked with Mr. Swirtz about it. He, in turn, talked to Carl's attorney who denied it. I was concerned about allowing Carl to have Christopher for visitation because of the medication he was on and the alleged drug overdose of prescription pills and cutting his wrists.

After that, we met with Mr. Swirtz and Mr. Moss. At that time, we decided to go to a marriage counselor. We went approximately five times and then Carl wouldn't go anymore. I talked to Mr. Earley over the phone after that; and, he told me that those things often happen when 1 spouse is told that things that happened and his reasons for leaving are not legitimate reasons, and that Carl probably didn't want to acknowledge the problems he was confronted with so he stopped going.

During that time there were more break-ins (police reports attached). On March 6, Carl had broken into the home. I had left the phone book open to where I was. It was his visitation weekend. He dropped Christopher off at a neighbor's house because he didn't want Christopher any more (copy of statement from neighbor is attached). I pulled in the driveway and Carl was sitting out in the street. He said, "Your precious little son is at one of the neighbors' houses."

I went inside the house and called the police. Before they arrived, I wanted [sic] to three different houses to look for Christopher before I found him. I returned to the house and there was broken glass everywhere and the front screen was all bent and ripped. Once I got inside the house, I sat down with Christopher and waited for the police.

While I was waiting, Carl returned and he was standing over me when Policeman Chris Blinkilde arrived. The officer asked me what was happening and he separated Carl and me. I told him I wanted Carl out of the house, that he had broken into the home through the front window. At that point, Carl took a handful of pills out of his pocket and put them into his mouth in front of the officer. The officer handcuffed him, put him in the police car and took him downtown.

Just before Father's Day, I told Carl that he could have visitation on Father's Day; and, on Father's Day morning, Carl called to say that the didn't want Christopher that day. So, I took the baby to my parents' house where we spent the day.

Since then, the break-ins have continued and on July 1st, he refused to pay any additional child support. He didn't pay any support again until September, just before we went to court for the abortion issue.

Since the Circuit Court hearing on the abortion issue, he has continuously harassed me, threatened me. I've had to leave my home because he wouldn't leave us alone. He would call at 1 o'clock in the morning, 5 o'clock in the morning. After I went to stay with my parents in Waterford, he still called long-distance to harass us.

I did inform the Friend of the Court of my leaving town and the reasons. I was concerned with visitation at that time; and, I did talk to Nancy Stockham regarding allowing him visitation. She told me not to worry about letting Carl have visitation. She said that situation was unstable and that I shouldn't worry about the visitation. An investigation was pending. Following that, both Mr. Swirtz and Nancy Stockham went on vacation.

Since then, it has been complete harassment and threats. He has called at least two or three times a day. If he didn't call, he was there in the morning and at night. He would stand outside banging and screaming and yelling and pounding on the windows. The police were usually called. One weekend he did it and three police cars came. They wouldn't do anything because he was just sitting in front of the house. I called Mr. Swirtz (on a Saturday) and he talked to the police officers but they still let him go.

On September 15, 1988, I was gone all day so I left the answering machine on. When my mother and I got home about 5 o'clock, there as a message from Carl; and, he said that if I had done what he thought I had done, he would take Christopher and I would never see him again and, "That's a promise."

At the present time, Carl is staying with his sister, Lynn Lester; his 9-year-old niece, Kandi Lester; and Ken Robertson, his sister's boyfriend. Sometime ago, I was at this house when Kandi came into the room and said to her mother, "Mom, I don't want to smoke a joint with you." Then Kandi went outside and brought in some little green "pods" and asked me if I wanted some "pot". I corrected her and told her they were pods and she said, "No, pot!"

I have received a letter from Carl's mother, Geraldine Lewis, dated May 23, 1987, in which she acknowledged that Lynn

smoked pot and, in Geraldine's opinion, that was no worse than drinking.

I am afraid that Carlton will kidnap Christopher to prevent me from having him and I am afraid to let Christopher go with Carlton for visitation at the home at which Carlton is staying.

I am willing to allow Carlton to have supervised visitation of Christopher; and, we have mutual friends, Bob and Eva Andrews, who live at Myrtle Grove Trailer Park and whose telephone number is 767-2571.

Further, Deponent sayeth not.

SHAWN KATHLEEN LEWIS
Shawn Kathleen Lewis

STATE OF MICHIGAN)
COUNTY OF GENESEE) ss.

Subscribed and sworn to before me this 16th day of September, A.D., 1988

ANN KAREN WICK
Ann Karen Wick, Notary Public
Genesee County, Michigan
My commission expires: 1-15-92

Prepared by:
ARTHUR C. SWIRTZ P21214
Attorney at Law
702 Church Street
Flint, Michigan 48502
313-235-2929

OFFENSE	CODE					OFFENSE NO
ASSAULT	04LD					0016978

COMPLAINANT NAME	SX	RC	AGE	ST NO	STREET NAME	CITY	PHONE
LEWIS, SHAWN	W		23	3235	CHURCHILL AV		H 7361621 W
LEWIS, SHAWN	W		23	3235	CHURCHILL AV		W

REPORTED BY	SX	RC	AGE	ST NO	STREET NAME	CITY	PHONE
DUBUQUE COMPL	TX			0532	05324321200005324321700		Y N Y

REPORTED TO	REPORTED PER	REPT HOW	DATE	TIME	OCCURRED	DATE TIME	RPT	DISP	SUS	ARR
					FROM					

ST NO	LOCATION OCCURRED	ESC MEANS	WEAPON/TOOL	REPTD	PTRL	DIST
3235	CHURCHILL AV		0052 0014 0002			

VEHICLE MAKE	CODE	YEAR	BODY	MODEL	TOP	COLOR	STM	LIC NO	YR	STATE	LOCKED VEH		LOCKED IG
											YES	NO	YES
VIN				DIST FEATURE							INFO FROM		

COMPL STATES THAT HER HUSBAND WHO MOVED OUT A WEEK AGO CAME OVER AND STARTED A FIGHT WITH COMPL. SUBJ HIT COMPL ON BOTHS ARMS AND LEFT SIDE. SUBJ THEN PUSH COMPL THRUW THE SCREEN DOOR. SUBJ THEN LEFT.

MDOP 14 0004753

COMPLAINANT NAME	SX	RC	AGE	ST NO	STREET NAME	CITY	PHONE
LEWIS, SHAWN	F	W	24	3235	CHURCHILL AV		7360982
LEWIS, SHAWN	F	W	24	3235	CHURCHILL AV		7360982

	SAME	REPORTED PER	TX	REPT HOW	021588	TIME	1400	TIME	021588	1400	DATE	021588	RPT	DISP	SUS	ARR
										FROM		TO				
ST NO 3235	CHURCHILL	LOCATION OCCURRED			AV	ESC MEANS		WEAPON/TOOL	052				DIST			

VEHICLE MAKE	CODE	YEAR	BODY	MODEL	TOP	COLOR	BTM	LIC NO	YR	STATE	LOCKED VEH		LOCKED IGN	
											YES	NO	YES	NO

VIN	DIST FEATURE	INFO FROM

RPTS THAT EX-HUSBAND CAME OVER UNINVITED. CPLT WOULD NOT OPEN THE DOOR. SUSP KICKED THE DOOR IN, BREAKING SAME. HAS INS.

THEY ARE IN THE PROCESS OF GETTING A DIVORCE.

OFFENSE	CODE	PM	PM	PM	PM	OFFENSE NO
THREAT	24					0010422

COMPLAINANT NAME	SX	RC	AGE	ST NO	STREET NAME	CITY	PHONE	AM/PM
LEWIS, SHAWN	F	W	24	3235	CHURCHILL		H 7360982	
LEWIS, SHAWN	F	W	24	3235	CHURCHILL		W 7360982	

REPORTED BY	SX	RC	AGE	ST NO	STREET NAME	CITY	PHONE	AM/PM
JONES CMPLT	TX		040688	1425	040688	1200	040688 1200	Y N

REPORTED TO	REPORTED PER	REPT HOW	DATE	TIME	OCCURRED	DATE TIME	APT	DISP	SUS	ARR	WIT
			AV		FROM	0052 TO 0B14	0402				

ST NO	LOCATION OCCURRED	ESC MEANS	WEAPON/TOOL	REP AREA	F PTRL	DIST	THIRY
3235	CHURCHILL						

VEHICLE MAKE	CODE	YEAR	BODY	MODEL	TOP	COLOR	BTM	LIC NO	YR	STATE	LOCKED VEH YES	LOCKED VEH NO	LOCKED IGN YES	LOCKED IGN NO

VIN

DIST FEATURE

INFO FROM

RPTS HER EX HUSBAND WHO HAS BROKEN INTO HER HOME BEFORE,
CALLED THIS AM TO WARN THE CMPLT THAT HE WOULD DO SO AGAIN.

| OFFENSE | | |

UNLAWFUL ENTRY 05B1 0025092

COMPLAINANT NAME	SX	RC	AGE	ST NO	STREET NAME	CITY	PHONE	AM/PM
LEWIS, SHAWN	F	W	25	3235	CHURCHHILL ST		7360982	
LEWIS, SHAWN	F	W	25	3235	CHURCHHILL ST		7360982	

VICTIM	REPORTED BY	REPT HOW	DATE	TIME	DATE	RPT	DISP	SUS	ARR	WIT
BAKER	TX		08/08/88	1120	08/06/88 THRU 08/08/88	Y		Y		

NO	LOCATION OCCURRED	ESC MEANS	WEAPON/TOOL	PLACE	F PTRL	DIST	ENTR
3235	CHURCHHILL ST			01			

VEHICLE MAKE	CODE	YEAR	BODY	MODEL	TOP	COLOR	BTM	LIC NO	YR	STATE	LOCKED VEH		LOCKED IGN	
											YES	NO	YES	NO

VIN DIST FEATURE INFO FROM

CPLT STS THAT A NEIGHBOR OBSVD HER HUSBAND, WHOM SHE HAS AN INJUNCTION AGAINST HIM, ENTERED HER HOUSE BY TAKING OUT FRONT DOOR GLASS. NOTHING KNOWN MISSING F/INSIDE HER HOUSE. HAS INS

12a

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

CASE NO. 88-158036-DM

JUDGE VALDEMAR WASHINGTON

SHAWN KATHLEEN LEWIS,

Plaintiff

—v.—

CARLTON JAMES LEWIS,

Defendant

ARTHUR C. SWIRTZ P21214
Attorney for Plaintiff-Appellant
702 Church Street
Flint, Michigan 48502
313-235-2929

ACLU FUND OF MICHIGAN by:
SHELLY R. SPIVACK P32615
LINDA L. PYLYPIW P29578
Of Counsel on the Issue of Injunction
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[sic]
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GENE MYERS P18139
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JAMES BOPP JR.
RICHARD E. COLESON
Attorneys for Guardian ad Litem
191 Harding Ave., P.O. Box 410
Terre Haute, Indiana 47808
812-238 2421

AFFIDAVIT

STATE OF MICHIGAN)
COUNTY OF GENESEE) ss.

NOW COMES Plaintiff-Appellant, SHAWN KATHLEEN LEWIS, and after being duly sworn deposes and says:

At approximately 12:30 p.m. today, Carl Lewis pulled up in the driveway. I did not hear him pull up. I heard a knock on the door and saw Carl Lewis' truck and immediately dead-bolted the door. I looked out the window. Carl said he wanted to come in and talk to me, and I would not reply. He proceeded to kick the steel door in, and enter my home. He started towards me, and my friend, Julie Murphy, immediately came between us. She grabbed his arm to pull him away, and I went to the other side of the room. He then began accusing me of killing his baby. He asked me if I did kill his baby, and I would not reply. Julie then spoke and said he did not know if that was true. Julie told him to leave, while I called the police. He left before the police arrived.

Further, Deponent sayeth not.

SHAWN KATHLEEN LEWIS
Shawn Kathleen Lewis

STATE OF MICHIGAN)
COUNTY OF GENESEE) ss.

Subscribed and sworn to before me this 28th day of September, A.D., 1988

MICHELLE R. RAMBURG

Michelle R. Ramburg, Notary Public
Genesee County, Michigan
My commission expires: 12-08-91

Prepared by:
ARTHUR C. SWIRTZ P21214
Attorney at Law
702 Church Street
Flint, Michigan 48502
313-235-2929

Linda L. Pylypiw
Attorney at Law
720 Church Street
Flint, MI 48502-1172
(313) 234-0980

October 19, 1988

Carol Bowman
Genesee County Osteopathic Medical Association
3921 Beecher Road
Flint, MI 48532

RE: John Stoker, D.O.

Dear Ms. Bowman:

Enclosed please find a copy of the Affidavit that has been filed with the U.S. Supreme Court on my client's behalf. As you can see, it is Ms. Lewis' position that Dr. Stoker released information regarding her without her permission. This information was released with the prior knowledge that the parties were in a hotly contested divorce case regarding Ms. Lewis' wish to terminate her pregnancy. As is evident by the attached statement, Dr. Stoker had already given a written statement to Ms. Lewis indicating that the termination of her pregnancy was warranted for her health. The statement given to Mr. Lewis was directly contradictory to his previous statement and is in error. Both statements were written without a physical examination of Ms. Lewis having been had.

Ms. Lewis' wishes to have this matter investigated regarding Dr. Stoker's breach of the physician-patient privilege. Also, in light of the serious damage that the misdiagnosis has done to Ms. Lewis, she would request that Dr. Stoker be ordered to retract his diagnosis as not being accurate. If you need any further information from my client or me, please feel free to contact me.

Yours truly,

LINDA L. PYLYPIW
Linda L. Pylypiw
Attorney at Law

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988
Case No. 88-555

GENE MYERS, Guardian ad Litem,

Petitioner

—v.—

SHAWN KATHLEEN LEWIS,

Respondent

AFFIDAVIT OF RESPONDENT

NOW COMES the Respondent, herein, SHAWN KATHLEEN LEWIS, being first duly sworn, and says:

1. That your affiant is the respondent herein and the Plaintiff in the original cause of action, an action for divorce filed in Circuit Court for the County of Genesee, State of Michigan, Case #

2. That your affiant has been advised that attached to the Petitioner's Petition for Writ of Certiorari to the Michigan Court of Appeals filed with this Court is a statement from Dr. John Stoker, D.O. Your affiant has been further informed and believes that the statement was given to her estranged husband, Carlton Lewis, for use in the instant case.

3. That Dr. John Stoker was her treating physician for her first pregnancy.

4. That from the date of conception of the fetus at issue here, she has not been treated by Dr. John Stoker regarding her pregnancy. Dr. Stoker has not physically examined her in conjunction with the pregnancy at issue here. Dr. Stoker has only

spoken to your affiant on one occasion regarding this pregnancy.

5. That no release of medical records was signed authorizing release of information to Carlton Lewis, James Bopp, Jr., or anyone acting on their behalf, nor was a release of medical records given orally.

6. That your affiant does not wish to waive the Physician-Patient privilege to allow this information to be divulged.

7. That your affiant has filed a complaint with the governing body that licenses Osteopathic doctors against Dr. John Stoker, D.O., because of this breech of confidentiality.

Your affiant sayeth further not.

Dated: October 14, 1988

SHAWN KATHLEEN LEWIS
Shawn Kathleen Lewis

STATE OF MICHIGAN)
) ss
County of Genesee)

On this 14th day of October, 1988, before me personally appeared the above named SHAWN KATHLEEN LEWIS to me known to be the person named in and who executed the within affidavit and who stated under oath that the contents thereof are true to the best of her information, knowledge and belief.

JUANITA L. KUZAVA
Juanita L. Kuzava
Notary Public, Genesee County, Michigan
My commission expires: October 10, 1989

Prepared by:
LINDA L. PYLYPIW (P29578)

VALLEY MEDICAL CENTER

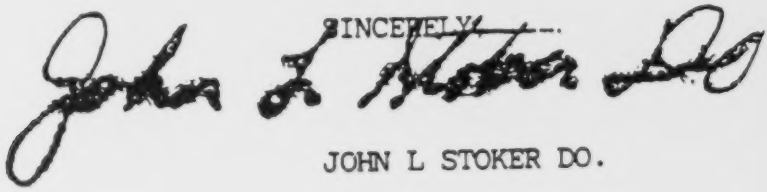
John L. Stoker, D.O., P.C.
G-5142 Miller Road
Flint, Michigan
(313) 733-3660

AUGUST 18,1988

TO WHOM IT MAY CONCERN:

SHAWN LEWIS HAD A DIFFICULT TIME WITH HER FIRST PREGNANCY ON THE DATE OF 04/09/87 AND SHE CANNOT HANDLE THE STRESS AT THIS TIME.

SINCERELY,



JOHN L STOKER DO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988
Case No. 88-555

GENE MYERS, Guardian ad Litem,

Petitioner

—v.—

SHAWN KATHLEEN LEWIS,

Respondent

Case No. 88-____

CARLTON JAMES LEWIS,

Petitioner

—v.—

SHAWN KATHLEEN LEWIS,

Respondent

DECLARATION

1. I have read both the Petition for a Writ of Certiorari filed with the U.S. Supreme Court on behalf of Gene Myers on September 30, 1988 and the Petition for a Writ of Certiorari filed on behalf of Carlton Lewis on October 21, 1988. I submit this declaration to correct serious factual misstatements that appear in both petitions concerning a meeting that occurred in Judge Washington's chambers on August 19, 1988 in connection with this case.

2. To my knowledge, no transcript was made of the August 19th meeting.

3. I was not physically present at the meeting. Steven Moss was present in Judge Washington's chambers and I was contacted by telephone.

4. Both petitions state that during that conversation I conceded that Shawn Lewis' attending physician had made the medical judgement that an abortion was not medically necessary for Ms. Lewis' well-being. I made no such concession. I stated only that I had no medical documentation that an abortion was medically necessary.

5. I also never conceded that Dr. John Stoker was Ms. Lewis' attending physician in connection with this pregnancy, because he was not. Dr. Stoker never physically examined or treated Ms. Lewis in connection with this pregnancy. In addition, Ms. Lewis never consented to the release by Dr. Stoker of information about her medical condition. I have filed, on behalf of Ms. Lewis, a complaint with the Genesee County Osteopathic Medical Association requesting that Dr. Stoker be ordered to retract this diagnosis as inaccurate. Moreover, to the extent Dr. Stoker had information about Ms. Lewis' medical condition the release of such information was a breach of the physician-patient privilege.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 28, 1988

LINDA L. PYLYPIW

Linda L. Pylypiw

C#31565

68th DISTRICT COURT RECORD

(For misdemeanors)

Date 9-28-88 Time 2:01 PM. Officer Villarreal

Name Carlton J. Lewis Address 3073 W. Dayton #28

Offense Unlawful Entry

By Kicking in front door at 3235 Churchill

At 3235 Churchill

HISTORY

Sir:

On 9-28-88 (Wed) while assign to dist B-12, I received radio call to phone Sgt. Simms at the desk. I then called Sgt. Simms, and she informed me to stop by 3235 churchill because Mrs Lewis was having trouble with her ex-husband. At approx. 2:01 pm I stopped by 3235 Churchill when I was met by a f/w later I.D. as Shawn Lewis f/w/25 of 3235 Churchill. Mrs. Lewis then stated that at approx. 12:30 pm today her Husband Carlton J. Lewis came over to her house, at which Shawn locked the door Carlton then knocked several times but was not admitted to the house. At this time Carlton kicked the door opening same, Carlton then entered Shawn house and

CONT.

BUREAU OF IDENTIFICATION

CRIMINAL RECORD

stated to Shawn "HAVE YOU KILLED MY BABY YET, BECAUSE IF YOU DO I'AM GOING TO KILL YOU." At this time Shawn's room mate Julie Murphy f/w/24 grabed and threw Carlton out the door. Carlton then got into his truck and left from this location in unknown direction.

I then talked to Julie Murphy f/w/24 and she stated the same story as Shawn had stated.

Sgt. Simms arrived on the scene at approx. 1:50 pm, and gave the ok for I.B. to come out and take some pictures of the damage to the front door.

Mrs Lewis also stated that Walter Kosiba m/w/ad also witness the unlawful entry, because he was next door working on the house outside. Mr. Korsiba left a card with Mrs Lewis from East Village Construction phone #238-1499, but I have not been able to talk to him

On September 29, 1988 Sgt McManaman talked with Witness Walter Kosiba who stated that on 9-28-88 at approx 12:15A he was working in the area of 3235 Churchill when he observed a Chevrolet pick-up pull up at 3235 Churchill. The driver got out of the truck and ran up to the door. He banged on the door yelling, "You killed my baby". The subject opened the storm door and kicked the inner door with his right foot, gaining entry. Kosiba heard loud screaming and yelling coming from inside the house. The subject exited the house, got back into the truck, and drove away.

Sgt McManaman talked with complainant Shawn Lewis who related that in Nov, 1987 her husband Carlton Lewis, moved out of the home at 3235 Churchill. Due to the fact that he continued to return and break-in, eviction papers were served on her husband in April 1988 by Court Officer William McAuley. Carlton Lewis, upon receiving the papers, returned to the house and removed furniture. He has all of his personal items and clothing out of the house as they were taken out in November when he moved.

THE DETROIT NEWS
Saturday, October 1, 1988

Lewis says spouse threatened her life

Husband in Flint abortion case faces criminal charge
By Jim Mitzelfeld
News Staff Writer

A Flint man who lost a U.S. Supreme Court bid to stop his estranged wife from having an abortion has been accused of threatening to kill her and faces criminal and civil charges as a result.

Shawn Lewis' attorney filed a petition Friday to have her estranged husband, Carlton Lewis, found in contempt of court for violating an April 21 court order barring him from threatening or assaulting her.

AN ARREST WARRANT was signed Thursday charging him with unlawful entry—a misdemeanor—for a Wednesday incident during which he allegedly kicked in the door of his wife's house.

According to a Flint police report, Carlton Lewis barged into the house, demanded to know if she had had the abortion and said, ". . . if you did, I'm going to kill you."

Shawn Lewis was not injured during the confrontation, police said.

Monday, the U.S. Supreme Court refused to overturn a Michigan Appeals Court ruling upholding Shawn Lewis' right to an abortion despite her husband's objections. Her attorneys have refused to say whether she has had an abortion.

Genesee County Circuit Judge Valdemar Washington, who is presiding over the couple's stormy divorce, scheduled a court hearing for Monday to consider Shawn Lewis' charge that Carlton Lewis violated an injunction barring him from threatening her.

NO ARRAIGNMENT date has been set on the criminal charge, however, and police have no plans to look for Lewis because the charge against him is only a misdemeanor, Flint Police Capt. Michael Hanna said.

Arthur Swirtz, Shawn Lewis' divorce attorney, has also asked for a new court order barring Carlton Lewis from Shawn Lewis' Flint home.

Steven Moss, Carlton Lewis' attorney, said he couldn't comment on the alleged threat because he hasn't been able to locate his client.

"The biggest thing I've asked him is don't go over there, don't bother them," Moss said.

"If he did it, I can understand. He's hurting. I understand his grief but that doesn't mean that's the right thing to do.

"I don't know what I would do if that was me. I might beat the hell out of her."

ACCORDING TO court records, Wednesday wasn't the first time Carlton Lewis had threatened his wife with violence. A judge issued a restraining order in April warning him he would be thrown in jail if he tried to hurt his wife.

In court papers filed Friday by her attorney, Shawn Lewis claims Carlton Lewis called her Sept. 15 and ". . . said that if I had done what he thought I had done, he would take Christopher (the couple's son) and I would never see him again."

THE DETROIT NEWS
Wednesday, October 5, 1988

2 left bitter by abortion
Court case, media glare take toll on Flint couple

By Jim Mitzelfeld
News Staff Writer

Shawn Lewis said Tuesday she can understand why her estranged husband went to court to try and stop her from having an abortion, but she still believes getting an abortion was the right thing.

Carlton Lewis said he still has trouble understanding how the judicial system failed him, but said his wife now will have to face a higher authority—God.

"I do understand his side completely. I feel sorry for him," Shawn Lewis said in her first public comments since winning her seven-week court battle to overturn an Aug. 9 injunction barring her from having an abortion.

In an interview on the front steps of her modest, single-story wood-frame home in Flint, Shawn Lewis said she was relieved to finally tell her side of the story that drew national attention and dashed any hopes of saving their stormy marriage.

SHE SAID she has been taking life "one day at a time" and trying to get things back together in the wake of the U.S. Supreme Court ruling last week that cleared the way for her to terminate her 11-week-old pregnancy.

The 24-year-old unemployed mother said she doesn't believe she should have to explain why she wanted an abortion but admitted that the emotional and physical strain of her first pregnancy—which resulted in the birth of the Lewises' son, Christopher—convinced her she never wanted to have more children.

The heavy-set Lewis, whose red hair outlines a freckled, cherubic face, described how her veins collapsed and she was hospitalized for a week with a kidney infection during her first pregnancy. She suffered high blood pressure and a blood-sugar imbalance and was bedridden for the final two months.

Please see Lewis/12A

Lewis
Abortion battle leaves husband, wife both bitter

From page 1A

"I was sick all the way through it," she said.

THE ILLNESS she faced during her first pregnancy "was a big part" of her decision to have an abortion, she said.

She said she was moved to end her silence because there's been "so much garbage that's been printed" about the case. She said she was traumatized by the media coverage, which included television camera crews chasing her out of court.

"It was hard enough. That just made it harder," she said.

Carlton Lewis, broke and bitter about the refusal of the nation's highest court to halt the abortion, said he never will forgive his wife for her decision.

"I COULD tell she felt bad for me. But as far as her concern that she killed a baby, she didn't have any concern for that," he said, recalling his feelings when she admitted to him Sunday that she had gone ahead with the abortion.

"She was kind of callous, like it was never really there. Like it was a growth and a cancer and she just got rid of it."

He said his wife may have won in the courts but eventually will have to answer to a higher authority.

"I believe that there's a heaven and a hell. I guess Shawn better do a lot of praying or she's going to hell," he said.

SHAWN LEWIS said she's not surprised by her husband's angry words, but she said she tried to break the news to him as gently as she could. She denied his assertion that she only had the abortion to get back at him.

"No. Nothing was done to hurt him," she said. "Carl says a lot of things when he's angry. He asked about the abortion and I told him. I think he had a right to know more than anyone else."

Carlton Lewis, a 25-year-old school custodian, said the lengthy court fight left him with $10,000 in legal bills and shattered his faith in the American judicial system and the country.

He said his wife had an unfair advantage in the custody battle over the fetus

because she received the free legal assistance of the American Civil Liberties Union.

He was forced to pay his own attorney fees without any support from abortion opponents, who he labeled "hypocrites" for failing to lend any financial support.

THE ONLY help he's gotten so far, he said, were $70 in contributions from two individuals who read about his plight.

"The worst thing I'm worried about right now is I'm just flat broke. I don't know how I'm going to pay my bills. I don't even have food for myself."

Carlton Lewis said he brings home $180 a week from his job sweeping floors at the Genesee Intermediate School District's Center for the Severely and Physically Handicapped. Out of that, he has to pay $50 a week in child support, and he said he's behind in rent on his mobile home.

The thin, bearded husband talked about the case while sitting on a bench Tuesday in the Flint Police Department awaiting arraignment on a misdemeanor charge stemming from an incident last Wednesday when he allegedly kicked in his wife's door and threatened to kill her.

FLINT DISTRICT Judge Michael McAra accepted his not-guilty plea and released Carlton Lewis on his own recognizance. He faces an Oct. 24 preliminary hearing on one count of unlawful entry. The maximum punishment is 90 days in jail and a $500 fine.

Christopher Lewis denied threatening his wife, but Shawn Lewis said the couple's brief marriage was dotted with violence.

Records on file with Flint Police Department show that Shawn Lewis called the police on six different occasions between May 24, 1987 and Carleton Lewis arrest Tuesday. The complaints included her allegations that he broke into her house several times, hit her once and threatened to kill her on another occasion.

Carlton Lewis denied ever striking his wife, but added: "If it would have been any other man there, she would have had her butt kicked several times."

Carlton Lewis said the marriage fell apart because his wife refused to clean house, cook him dinner or do any-

thing. She said she accepts half the blame for their troubles, but thinks he also must accept responsibility.

He finally moved out last November, and she filed for divorce Jan. 20. She became pregnant July 7 when a spermicide she used failed during a brief attempt at reconciliation.

When he discovered she was pregnant, he went to court to bar her from having an abortion. The Michigan Court of Appeals lifted the injunction and the case was appealed until the U.S. Supreme Court refused to consider it on an emergency basis.

TUESDAY, Shawn Lewis said she is no longer afraid her husband will hurt her, but only hopes they can some day be friends again.

"I hope so. We have a son. So we have to try," she said. Carlton Lewis said he is just hoping that those in the public who believe he was right in fighting to see his child born will help him pay his bills.

"It would be nice. I would appreciate the help," he said.

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Nos. 88-555, 88-683

IN THE

Supreme Court of the United States

October Term, 1988

GENE MYERS, Guardian Ad Litem, *Petitioner*,

v.

SHAWN KATHLEEN LEWIS, *Respondent*,

CARLTON JAMES LEWIS, *Petitioner*,

v.

SHAWN KATHLEEN LEWIS, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITIONER'S JOINT REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Petitioners Gene Myers and Carlton James Lewis submit this Joint Reply, pursuant to Sp. Ct. R. 22.5, to arguments first raised in Respondent's Brief in Opposition to petitions for certiorari numbered 88-555 and 88-683.

Respondent's Brief in Opposition is flawed in its approach to appellate practice before this Court. Three fundamental flaws underly her Brief: (1) that issues not raised below may now be raised, (2) that this Court will disregard the factual findings of

the trial court against the Respondent below, based on allegations outside the record, and (3) that independent state grounds may be asserted where the lower court did not employ them. Further errors flow from this attempted misuse of the appellate process. These are aggravated by use of the wrong constitutional analysis.[1]

To deny the petitions for certiorari herein, based upon Respondent's efforts to blur the clear-cut issues and factual findings, would reward such practices and encourage their use. In reality, the issues herein are very simple and their importance favors the granting of both petitions.

I. RESPONDENT'S BRIEF IS PREMISED UPON THREE FUNDAMENTAL ERRORS CONCERNING THE NATURE OF APPELLATE PRACTICE.

A. RESPONDENT MAY NOT RAISE ISSUES BEFORE THIS COURT NOT RAISED IN THE MICHIGAN COURT OF APPEALS.

Respondent believes she may raise issues before this Court which were neither raised nor passed upon by the Michigan Court of Appeals. She does this by seeking to challenge the facts found by the trial court, by arguing standing under state statutes, and by asserting independent state grounds for the decision.

The Michigan Court of Appeals held simply that the injunction at issue was to be "dissolved, because it interfere[d] with plaintiff's constitutional rights as set forth by the United States Supreme Court in *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*." Myers' Appendix at 3a (citations omitted).

The issue framed by this holding is simple: whether *Roe* and *Danforth* precluded the action of the trial court, under the facts

[1] Respondent further tries to persuade this Court by waging a war of words. Respondent's repeated use of such terms as "entirely frivolous," "absurd," "complete distortion," and "grossly misrepresents" adds heat but little light to the analysis. *See, e.g.*, Respondent's Brief at 10, 11, 12, 13, 18, 26.

as found by that court. No challenge to the facts found by the trial court was considered. No question of standing under state law was discussed. No independent state grounds were mentioned. These issues are not properly before this Court.

B. RESPONDENT MAY NOT ASSERT ALLEGATIONS OUTSIDE THE RECORD TO OVERTURN FACTUAL FINDINGS OF THE TRIAL COURT BELOW.

In this case, although no challenge was made in the lower courts to the sufficiency of the evidence to support the findings and judgment of the trial court, and although the Michigan Court of Appeals did not consider that issue (but relied wholly on federal constitutional law), the Respondent now seeks to challenge the findings of the trial court. Brief in Opposition at 3-16. Moreover, Respondent seeks a consideration of allegations beyond the record of this case. Thereby, Respondent asks this Court to sit as a trial court, weighing competing assertions of new evidence.

The trial court found, in its Statement of Facts, that "it was determined that in fact there was no such medical documentation [of the medical need for an abortion, as asserted by Respondent] and the doctor in fact said that it was specifically a social decision as opposed to a medical decision to terminate the pregnancy." Myers' Appendix at 8a. The clear implication of this finding is that her attending physician determined that there was no medical indication for the abortion sought.

Respondent now wants to avoid this finding by filing affidavits in this court. She alleges that Dr. Stoker was not really Respondent's physician and that he really did say that she had medical indications for an abortion. Such an effort to counter the findings of a trial court with allegations outside the record (and, therefore, not subject to the usual requirements of evidence, such as a proper foundation and cross-examination of witnesses, with affidavits in the United States Supreme Court is improper. By failing to raise her challenge to the factual

findings of the trial court by specifying it as an issue on appeal before the Michigan Court of Appeals, Respondent has waived this issue.

Moreover, where the facts of a case are properly before this Court, it will only reconsider the state court's findings of facts in a limited set of circumstances. *See, e.g.*, Stern, Gressman & Shapiro, *Supreme Court Practice* 185-87 (6th ed. 1986) (listing the situations in which this Court has examined the facts of a case). This set of circumstances may be distilled into two major exceptions to the rule that "[t]he Supreme Court will not exert its jurisdiction merely to review a decision of a state court upon a question of fact. And once a case is otherwise before it, the Court generally will not reexamine the state court's findings and conclusions of fact." *Id.* at 185 (citing, *inter alia*, *Grayson v. Harris*, 267 U.S. 352, 358 (1925)).

First, this Court will review a state court's findings "where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it." *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927). In the present case, there is evidence to support the finding of fact of the trial court.

Second, this Court will review state court findings of fact "where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass on the Federal question, to analyze the facts." *Id.* While this second exception may apply in the instant case, it is clear that analysis of the facts legitimately in evidence supports the issuance of the injunction by the trial court, if *Roe* does not preclude such action. Thus, the true issue is one of constitutional law and not one of fact.

While this Court has the freedom to make an independent determination of the facts, *Creswill v. Knights of Pythias*, 225 U.S. 246, 262 (1912), Respondent seeks to have this Court deny the petitions for certiorari herein on the basis of a *de novo* hearing on allegations outside the record. Because a *de novo* hearing is beyond anything approved by this Court, the

request for it serves as no basis on which to deny the writs sought herein.

C. RESPONDENT MAY NOT ASSERT INDEPENDENT STATE GROUNDS NOT RELIED UPON IN THE LOWER APPELLATE COURTS BY CLAIMING THAT THE STATE HAS NOT RECOGNIZED AN INTEREST IN UNBORN HUMAN LIFE AND THAT PETITIONER MYERS HAS NO STANDING UNDER STATE LAW.

Respondent declares that the State of Michigan has not asserted its interest in unborn human life. Brief in Opposition at 23-26.[2] This argument fails the test of logic. If, indeed, there is state action herein, as the Respondent insists, then the state must have acted through the trial court. The notion that the trial court cannot base its decision on a state interest recognized in Michigan law,[3] but that the state of Michigan must assert that interest by statute or by acting as a party, is erroneous. Michigan law has recognized an interest in protecting fetal life by statute and prior court opinion, upon which the trial court could base its opinion.[4] Finally, whether Michigan has recognized an interest in protecting fetal and paternal rights is a matter of state law, which, if unclear, should be decided by the state courts on remand, after this Court corrects the error of law that *Roe* and its progeny preclude the action of the trial court herein. *Cf. Merchant's National Bank v. Richmond*, 256 U.S. 635, 638 (1921) (Court corrected the

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[2] In addition to the flaws noted *infra*, this issue was not timely raised in the court of appeals and is, therefore, waived on appeal.

[3] *See* Myers Petition at 14-15 for the clear statement of Michigan public policy on abortion by the Michigan Supreme Court, which declared it the public policy of Michigan to oppose abortion except to save the life of the mother.

[4] *Id.* Moreover, the referendum to overrule the legislature and allow public funding of abortion in Michigan, upon which Respondent relies to cast doubt on the public policy of Michigan, Brief in Opposition at 26 & n.17, was resoundingly defeated in the election of November 8, 1988. Michigan forcefully rejected public funding of abortion.

error of constitutional law but left open a question of fact to be decided by the state court on remand).

Likewise, whether Petitioner Myers has standing under the Michigan guardian ad litem statute is a matter of state law, not relied upon by the Michigan Court of Appeals in striking down the injunction of the trial court. Brief in Opposition at 1 & n. 1.

II. RESPONDENT EMPLOYS A FLAWED CONSTITUTIONAL ANALYSIS.

Respondent argues that "Petitioners' failure to assert a compelling state interest is fatal because a compelling interest is essential to justify any state interference with Ms. Lewis' abortion decision." Brief in Opposition at 16. Respondent misunderstands the argument. Petitioners argue that this Court has never recognized a fundamental right to a non-medically indicated abortion. Because the trial court found that there is no medical indication for the abortion sought herein, there is no fundamental right. Therefore, no compelling state interest need be shown.

Further, Respondent would make of the abortion right an absolute right of a woman to "control her body." *Id.* at 12. This radical autonomy model of the abortion liberty clouds Respondent's perception of the analysis herein, but it was expressly rejected by this Court in *Roe*. 410 U.S. at 154. This Court also expressly rejected abortion on demand, the corollary of such a model. *Doe v. Bolton*, 410 U.S. 179, 189 (1973). Thus, Respondent's representation of the abortion liberty as an absolute right, excluding the consideration of all competing interests, is erroneous.

Nor did *Roe* forever eliminate the standing of guardians ad litem representing the interests of unborn children. Respondent attempts a sleight of hand by claiming that the Guardian Ad Litem herein is asserting the "right to life" of Unborn Child Lewis, and, therefore, he has no standing, because Unborn Child Lewis is not a "person" within the meaning of the Fourteenth Amendment. Brief in Opposition at 1-3. This error also flows from a misunderstanding of the analysis.

Petitioner Myers is not asserting the "right to life" of Unborn Child Lewis. Therefore, Respondent's discussion of personhood is superfluous. Rather, Petitioners defend the action of the Michigan trial court on the basis that it had a legitimate, constitutionally permissible state purpose in protecting fetal life and in encouraging childbirth over abortion — derivable from, *inter alia*, its parens patriae power and its institutional self-interest, not the Fourteenth Amendment — to which the trial court's action of enjoining a non-medically indicated abortion was rationally related. Because the interests in fetal life find their source in places other than the Fourteenth Amendment, what the Court has held concerning the personhood of Unborn Child Lewis under the Fourteenth Amendment is wholly irrelevant.[5]

Respondent also argues that an abortion is always medically indicated because "abortion, particularly early abortion, is safer than continued pregnancy and child birth." Brief in Opposition at 13 & n.8. Respondent argues that this is "always" so "in the first trimester," because "*Roe* implicitly recognized" that abortion was always safer in the first trimester than carrying the unborn child to term. *Id.*

While initially appealing, this argument is erroneous. First, it makes this Court's discussions of medical judgment and medical necessity irrelevant surplusage. *See* Myers' Petition at 8-12 (citing numerous references by this Court to a requirement of medical necessity for the well-being of the mother, including appropriate sanctions for physicians who violated that standard). Finally, as noted above, this Court has rejected

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[5] Likewise, as Petitioners defend state action that has already occurred, based on a satisfaction of the rational basis test, the assertion that a woman can obtain an abortion without state action and, thus, there can be no federal remedy, is irrelevant as well. Brief in Opposition at 18. This flawed analysis flows from a fundamental misunderstanding of the theory by Respondent. While state action might be required for Petitioners to assert a Fourteenth Amendment *right* to a consideration of their interest, it is not required where they, as here, assert that the state had a rational basis for pursuing the protection of their interests by injunction — a legitimate, constitutionally permissible purpose.

abortion on demand, even in the first trimester. If there were always medical indications for an abortion, as alleged by Respondent, then this Court would have approved abortion on demand.

In sum, the Respondent has misunderstood the analysis employed by this Court in the abortion cases. As the analysis of Respondent is flawed, it serves as no basis to deny the petitions for certiorari sought herein.

CONCLUSION

The issue herein is simple: whether *Roe* and *Danforth* precluded the trial court from issuing an injunction to protect fetal and paternal interests where the attending physician has found that there is no medical indication for the abortion sought. In simpler terms, it is whether this Court recognizes abortion on demand.

Respondent seeks to change the case by attempting to overturn factual findings of the trial court by asserting new allegations of fact on appeal. If she was dissatisfied with the statement of Dr. Stoker, it was her duty in the trial court to find another physician. If she believed Dr. Stoker was the wrong physician, it was her duty in the trial court to bring in the right one, or, at least, submit her evidence of the error to the fact finder. If she believed the fact finder was in error as to those facts, it was her duty to appeal those claimed factual errors to the Michigan Court of Appeals. Instead, she proceeded with her federal question, accepting the findings of the trial court.

Respondent won on her federal question. The Michigan Court of Appeals decided the appeal solely on the basis of the federal question.

Now Respondent seeks to muddy the crystal clarity of this case by asking this Court to relitigate the facts and by raising issues not passed upon below. Affidavits alleging factual errors on appeal to this Court cannot defeat the factual finding of a trial court. This Court should reject such practices and not encourage them by denying certiorari on such a basis.

This Court needs only to correct the misreading of *Roe* and *Danforth* by the Michigan Court of Appeals, which found those cases to countenance abortion on demand, even where the only evidence in this case is that the woman's physician has decided that the abortion sought is for purely non-medical reasons, and where the finder of fact has so found, even employing the broad definition of health in *Bolton*. All other matters of which Respondent complains have either been waived or should be resolved by the Michigan courts. This Court should take this case to clarify the plain misunderstanding of its holdings in two cases critical to a matter of great public importance, the regulation of abortion. The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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